The Reliance Basis of Estoppels by Conduct

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STATEMENT AS TO ORIGINALITY

This thesis is my own original work. It includes substantial parts of the following articles, which were written solely by me during the period of candidature:

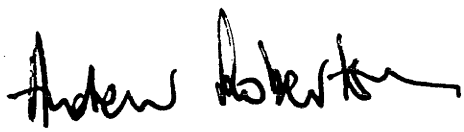
'Knowledge and Unconscionability in a Unified Estoppel' (1998) 24 *Monash University Law Review* 115-144

'Situating Equitable Estoppel Within the Law of Obligations' (1997) 19 *Sydney Law Review* 32-64

'Satisfying the Minimum Equity: Equitable Estoppel Remedies after *Verwayen*' (1996) 20 *Melbourne University Law Review* 805-847

'Towards a Unifying Purpose for Estoppel' (1996) 19 *Monash University Law Review* 1-29

'The "Reasonableness" Requirement in Estoppel' (1995) 1 *Canberra Law Review* 231-235



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ABSTRACT

The nature of estoppel by conduct has been dramatically transformed by the High Court in the last 15 years. The equitable doctrines of promissory and proprietary estoppel have been brought together to form a substantive doctrine of equitable estoppel, which provides a cause of action in a wide range of circumstances. Recent decisions in the lower courts have shown that the reach of the new equitable estoppel is far broader than that of its predecessor doctrines. It is beginning to occupy a prominent place in the law of obligations. The High Court has also begun in its recent decisions to articulate the principles by which the courts should exercise their discretion in giving effect to the new doctrine. At the same time there has been increasing recognition of the similarities between common law and equitable estoppels by conduct, with a number of judgments treating those principles as amalgamated in a unified doctrine of estoppel by conduct. Those developments have raised important questions about the philosophy of estoppel by conduct at common law and in equity, as well as important questions about the way in which the new doctrines operate.

This thesis aims to explore the philosophy of estoppel by conduct in Australia. It does so by identifying the contending theories as to the purpose of estoppel by conduct, and examining the extent to which those theories are reflected in the operation of the common law and equitable doctrines. The contending theories identified by the thesis are promise theory (which is based on the notion that the purpose of the doctrines of estoppel by conduct is the enforcement of certain types of promises), conscience theory (which is based on the notion that the purpose of estoppel is the prevention of unconscionable conduct) and reliance theory (which is based on the notion that the purpose of estoppel is the prevention of certain harm resulting from reliance on the conduct of others). Most judges and commentators in Australia adopt a pluralistic view of the purpose of estoppel, which assumes that at least the protection of reliance and the prevention of unconscionable conduct can be pursued simultaneously.

The central argument of the thesis is that the three contending theories are, at various important points, inconsistent with one another. The failure to resolve the conflicts between the three contending theories has left fundamental doctrinal questions unresolved. In order to resolve those questions, there is a need to recognise one of the contending theories as expressing the essential purpose of estoppel by conduct. The thesis argues that a reliance-based philosophy best characterises both the common law and equitable doctrines of estoppel by conduct and appears to provide the fundamental guiding motive of both doctrines. The thesis also argues that, normatively, reliance theory provides the best basis on which to organise estoppel by conduct and by which to resolve the various unresolved doctrinal questions. The thesis focuses on Australian law, but traces the development of relevant principles through the English cases, draws on New Zealand and Canadian law, and draws comparisons with the laws of England and the United States where appropriate.

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Chapter 1

INTRODUCTION

The aim of this thesis is to identify the goals of estoppel by conduct at common law and in equity, and to consider the extent to which the principles of estoppel by conduct are structured in accordance with those goals. The philosophy of estoppel by conduct has become a matter of considerable importance in recent years because the principles of estoppel are in a state of great change. Recent decisions of the High Court have witnessed the recognition of a unified, substantive doctrine of equitable estoppel and the development of a more coherent approach to the granting of remedies to give effect to that doctrine. There have also been attempts to unify the common law and equitable principles of estoppel. Each of those developments has been accompanied by, or facilitated by, an examination of the purposes and philosophies underlying the principles of estoppel. As this thesis will show, the recent developments in estoppel doctrine have left unanswered questions of great practical and theoretical significance, which makes further change inevitable. A coherent philosophy is needed to resolve the unanswered questions in estoppel, necessitating a detailed analysis of the purposes of the doctrines, and the extent to which those purposes are manifested in the approaches of the courts to questions of liability and remedy.

The approach to be taken in this thesis is broadly similar to that used by Jules Coleman in his treatise on the philosophy of tort law.[1] The first step will be to identify the competing goals or purposes of estoppel, the second will be to characterise the principles by which liability and remedy are determined, and to consider the extent to which the various philosophies appears to underlie each principle. The detailed examination of each of the principal rules relating to liability and remedy will reveal tensions between the various philosophies and will reveal the extent to which the principles of liability and remedy satisfy the various purposes being pursued. That examination will indicate the extent to

[1] Jules Coleman, *Risks and Wrongs* (1992), esp at 204.

which the various philosophies are manifested in the structure and operation of the principles of estoppel by conduct, and will thus indicate which of the philosophies can, descriptively, be regarded as providing the guiding motive of estoppel by conduct.

The central argument of this thesis is that three different philosophies can be said to be reflected in the principles of estoppel by conduct. Those philosophies are often inconsistent with one another, and there is a need to emphasise one of the contending philosophies as expressing the essential purpose of estoppel by conduct. The first philosophy is based on reliance: that the purpose of estoppel by conduct is to provide protection against harm resulting from reliance on the conduct of others. The second contending philosophy is based on conscience: that the purpose of estoppel by conduct is to prevent unconscionable conduct. The third philosophy can be described as a promise-based philosophy: that the purpose of estoppel is the fulfilment of certain promises. This thesis will show that there are various points in the establishment of an estoppel, and in giving effect to an estoppel, at which a choice must be made between the contending purposes. There is thus a need for a single philosophy of estoppel to be given primacy and to be recognised and emphasised as expressing the principal purpose of estoppel. The recognition of one of the three contending motives as the basis of estoppel would facilitate the resolution of important unresolved doctrinal questions. The thesis will show that, although all three philosophies are evident in estoppel, the fundamental philosophy of the principles of estoppel, as they have been reorganised by the High Court in recent decisions, is and should be a reliance-based philosophy. Both the equitable and common law principles of estoppel by conduct are essentially based on the need to provide protection against the detrimental consequences of reliance on the conduct of others.

I. THE STATE OF ESTOPPEL TODAY

The subject matter of this thesis is the set of principles operating at common law and in equity by which an estoppel can arise out of a person's conduct. One of the unresolved issues in this area of the law is how many separate doctrines of

estoppel by conduct operate, and should operate, in Australian law. The better view is that, pending further determination by the High Court, two doctrines of estoppel by conduct presently operate: common law estoppel and equitable estoppel. Both of those doctrines operate in relation to an assumption which one party has been induced to adopt as a result of conduct by a second party, and each doctrine requires that the first party must have acted, or refrained from acting, on the faith of that assumption, in such a way that he or she will suffer detriment if the assumption is not fulfilled. Three basic elements, therefore, make up the core of each of the two doctrines: an assumption, inducement and detrimental reliance.[2] The primary differences between the two doctrines arise in relation to the nature of the assumption that is adopted and acted upon by the representee, and the way in which the courts give effect to the estoppel once it has arisen.

The first difference between common law and equitable estoppel relates to the circumstances in which they operate: while common law estoppel is applied primarily to assumptions of existing fact, and occasionally to assumptions relating to the legal rights of the parties,[3] equitable estoppel can operate in relation to assumptions relating to the future conduct of the representor or the future legal relationship between the parties. As well as being differentiated by the circumstances in which they operate, the common law and equitable doctrines also differ quite markedly in the way in which they operate. When common law estoppel is applied to an assumption of existing fact, it has what is often described as an evidentiary operation. Its effect is to prevent the representor from denying the truth of an assumption of fact, and thereby establish a factual state of affairs by reference to which the rights of the parties are determined.[4] The

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[2] Once could add the requirement that the representor must also have departed or threatened to depart from the assumption in question, thus raising the prospect of detriment. It is more accurate, however, to say that an estoppel arises merely by virtue of the assumption, inducement and detrimental reliance, even before the representor threatens to depart from the assumption. At common law, an estoppel then arises which prevents the representor from acting inconsistently with the assumption. In equity, an estoppel then arises which prevents the representor from acting inconsistently with the assumption without taking steps to ensure that the departure does not cause harm to the representee.

[3] The application of common law estoppel to assumptions of existing rights is discussed below, text accompanying nn 127-144.

[4] *Seton, Laing, & Co v Lafone* (1887) 19 QBD 68, 70 (Lord Esher MR); *Low v Bouverie* [1891] 3 Ch 82, 101 (Lindley LJ); *Re Ottos Kopje Diamond Mines Ltd* [1893] 1 Ch 618, 628 (Bowen LJ). The concept is discussed and explained in *Waltons Stores (Interstate) Ltd v Maher* (1988)

representor is said to be 'estopped' from denying the facts assumed by the representee to be true. When common law estoppel is applied to assumptions relating to the existing legal rights of the parties, it is not accurate to describe the doctrine as evidentiary, since the estoppel goes beyond merely establishing a factual state of affairs. In those cases the estoppel operates in a more direct manner to prevent the representor from denying the existence of rights which would not otherwise exist. Equitable estoppel, on the other hand, does not operate simply to preclude the denial of facts and rights. Rather, it is a substantive doctrine which operates to create new rights in the representee, and which requires the court to fashion a remedy to give effect to those rights.

A difficulty of discussing estoppel by conduct in the abstract is in finding compendious expressions which can be used to describe the parties and the relevant conduct on which the estoppel is based. As the following discussion will show, an estoppel can arise in at least four different ways: first, from a *representation* as to an existing fact, as to the future conduct of the representor or as to the legal rights of the parties; secondly, from a *promise*, embodying a commitment by the promisor that he or she will act in a particular way in the future; thirdly, from an *act of remaining silent*, which induces a belief in another party that a certain state of affairs exists, that the second party has certain rights or that the first party will act in some way in the future; and fourthly from a *course of conduct* by one party which induces such a belief in another. The different types of conduct from which estoppels arise can, therefore, variously be described as representations, promises, silence, acquiescence or a course of conduct. The parties can similarly be described in numerous different ways. For simplicity, therefore, the person claiming the benefit of an estoppel will be referred to throughout this thesis as *the representee*, and the person against whom an estoppel is claimed will be referred to as *the representor*. The expressions are intended to cover all types of conduct from which an estoppel can arise, including the making of promises,

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164 CLR 387, 415-6 (Brennan J), 444-5 (Deane J), 459 (Gaudron J); *Commonwealth v Verwayen* (1990) 170 CLR 394, 411 (Mason CJ), 500 (McHugh J) and George Spencer Bower and Sir Alexander Turner, *The Law Relating to Estoppel by Representation* (3rd ed, 1977) 7-8.

the act of remaining silent and other types of conduct which cannot neatly be categorised or labelled.

A. *Common Law Estoppel*

1. Classification and Nomenclature

The doctrine described throughout this thesis as 'common law estoppel' is the common law principle that prevents a person (the representor) from resiling from an assumption of fact which they have induced a second person (the representee) to adopt. That principle operates only where the representee has acted on the faith of the assumption in such a way that he or she will suffer detriment if the representor is allowed to act in a way that is inconsistent with the relevant assumption. The following discussion will show that the better view is that there is a single principle of estoppel by conduct at common law, which can operate in a number of different circumstances, rather than a number of discrete principles.

Unlike estoppel in equity, as will be seen, estoppel at common law remains true to the etymology of the word 'estoppel'. The *Shorter Oxford English Dictionary* suggests that the word 'estoppel' originated from the old French word 'estoup', meaning plug or stopper.[5] The effect of an estoppel at common law is to 'stop up' the mouth of the representor, to prevent the representor from alleging that the state of affairs is otherwise than as he or she had induced the representee to assume. This connection between the origin of the word and its effect was famously described by Sir Edward Coke in 1628 as follows:

> Estoppe commeth of the French word Estoupe, from whence the English word Stopped: and it is called an Estoppel or Conclusion, because a man's owne Act or acceptance stoppeth or closeth up his mouth to alledge or plead the truth.[6]

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[5] Lesley Brown (ed), *The New Shorter Oxford English Dictionary on Historical Principles* (1993) vol 1, 854.

[6] Sir Edward Coke, *The First Part of the Institutes of the Laws of England; or a Commentary upon Littleton* (1628) 352(a).

Coke distinguished between three different types of estoppel: estoppel by record, estoppel by deed and estoppel *in pais*, which will be discussed in turn below and placed in their modern context:

> Touching estoppels, which is an excellent and curious kind of learning, it is observed that there be three kinds of estoppels, viz. by matter of record, by matter in writing, and by matter in pais.[7]

(a) Estoppel by record

The first estoppel identified by Coke, estoppel by record, survives today as the more limited set of principles of *res judicata* and issue estoppel, which ensure the binding and conclusive effect of legal determinations.[8] *Res judicata* prevents the re-litigation of causes of action, while issue estoppel prevents the re-litigation of particular issues of fact or law.[9] Those principles are concerned with the binding nature of judicial decisions, and are justified by the public interest in the settlement of disputes and by the right of individual litigants to protection from vexatious multiplication of suits.[10] Neither *res judicata* nor issue estoppel have anything in common, either in content or rationale, with the principles of estoppel by conduct at common law or equity.[11] Accordingly, they will not be discussed further in this thesis.

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[7] Ibid.

[8] Patrick Parkinson, 'Estoppel' in Patrick Parkinson (ed), *The Principles of Equity* (1996) 201, 208.

[9] *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 519, 597 (Gibbs CJ, Mason and Aickin J).

[10] George Spencer Bower, Sir Alexander Turner and KR Handley, *The Doctrine of Res Judicata* (3rd ed, 1996) 10.

[11] Parkinson, above n 8. It was for this reason that Fullagar J said in *Jackson v Godsmith* (1950) 81 CLR 446, 466 that issue estoppel is not correctly classified under the heading estoppel at all.

(b) Estoppel by deed

The second of Coke's estoppels, the principle of estoppel by writing, is today known as estoppel by deed.[12] Although the principle described by Coke applied only to the operative part of a deed,[13] it is clear that the principle now operates primarily, if not exclusively, in relation to facts set out in the recitals of deeds.[14] The basis of the principle of estoppel by deed is that where parties to a deed have agreed that certain facts form the basis on which they are covenanting, then they should be held to those agreed facts for the purposes of the transaction in question.[15] There has for some time been uncertainty as to the relationship of estoppel by deed with the broader common law principle of estoppel by convention, which holds the parties to a state of affairs adopted as the basis of any contract or other dealing between them. There remains some doubt as to whether estoppel by deed is simply a particular instance of estoppel by convention, or whether it is a discrete doctrine which has its foundation in the binding effect of the solemn recitation of facts under seal. Spencer Bower and Turner suggest that the references in the cases to sealing and delivery are sufficiently persistent to raise a real question as to whether it is not the solemnity of the execution of a deed which supplies the whole justification of estoppel by deed.[16]

Despite those references in the cases, Spencer Bower and Turner argue that estoppel by deed has evolved into a sub-class of estoppel by convention, which applies to the adoption of a state of affairs as the conventional basis of any contract, whether those facts are set out in writing or not.[17] It has, as they note, been held in a significant number of cases that the principle of estoppel by deed

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[12] Coke, above n 6, actually described estoppel in writing as operating 'by deed indented'.
[13] Coke, ibid 352b: 'everie estoppel ought to be a precise affirmation of that which maketh the estoppell ... Neither doth a recital conclude, because it is no direct affirmation.'
[14] *Bowman v Taylor* (1834) 2 Ad & El 278; 111 ER 108, 112-3 (Taunton J), 113-4 (Williams J); *Carpenter v Buller* (1841) 8 M & W 209; 151 ER 1013, 1014 (Parke B); Spencer Bower and Turner, above n 4, 172.
[15] See *Dabbs v Seaman* (1925) 36 CLR 538, 548-50 (Isaacs J) and Parkinson, above n 8, 209.
[16] Above n 14, 161-2, citing as examples: *Greer v Kettle* [1938] AC 156, 171 (Lord Maugham) and *Newis v General Accident Fire and Life Assurance Corporation* (1910) 11 CLR 620, 628 (Griffith CJ).
[17] Spencer Bower and Turner, above n 4, 161-175.

may be raised by the recitation of facts in instruments not under seal.[18] Accordingly, Spencer Bower and Turner conclude that the notion that estoppel by deed is *sui generis* must be abandoned, and the principle should be seen as part of the broader principle of estoppel by convention.[19] That brings us to the more difficult question whether estoppel by convention forms part of the common law principle of estoppel by conduct which, along with its equitable counterpart, is the subject of this thesis. The essential question is whether estoppel by convention is an emanation of common law estoppel by conduct, and therefore operates only on proof of detrimental reliance by the party seeking to assert the estoppel, or whether it is a separate principle which is not based on detrimental reliance, but rather on the binding effect of the mutual adoption of facts as the basis of dealings between parties.

(c) Estoppel by convention

Estoppel by convention is a form of estoppel which applies where parties to an agreement have, by convention, adopted a state of affairs as the basis of their agreement or relations. The estoppel holds the parties to the agreed or assumed facts for the purposes of the transaction in question.[20] The estoppel may operate by virtue of an express term of a contract, where the parties have expressly agreed that they will take certain facts to be true, or, more commonly, the parties may be precluded merely on the basis of a common assumption which has been adopted as to the factual basis of the contract.[21] In *Con-Stan Industries Pty Ltd v*

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[18] Eg: *Carpenter v Buller* (1841) 8 M & W 209; 151 ER 1013, 1014 (Parke B); *Ashpitel v Bryan* (1864) 5 B & S 723; 122 ER 999, 1000-1.

[19] This conclusion was approved by Clarke J in *Offshore Oil NL v Southern Cross Exploration NL* (1985) 3 NSWLR 337, 341. In *Ferno Holdings Pty Ltd v Lee* [1992] NSW Conv R 55-645, 59,691 Cohen J described estoppel by deed as a example of estoppel by convention, 'with the distinction that it is not necessary in the former to establish that either party has acted to his or her detriment as a result of statements forming part of the deed.' Estoppel by deed was also described as an example of estoppel by convention by Needham J in *Re Patrick Corporation* [1981] 2 NSWR 328, 332, although Needham J regarded detrimental reliance as being unnecessary for any form of estoppel by convention.

[20] In *Norwegian American Cruises A/S v Paul Mundy Ltd (The "Visafjord")* [1988] 2 Lloyd's Rep 343, 351 Bingham LJ noted that estoppel by convention is not limited to parties about to enter into a contract, but can operate in relation to any dealings between parties.

[21] Spencer Bower and Turner, above n 4, 158-9.

Norwich Winterthur Insurance (Australia) Ltd,[22] the High Court held that an estoppel by convention must be based on an assumption of fact, and could not arise from an assumption as to the legal effect of the parties' conduct.[23] There have however, been numerous cases in which assumptions as to the legal rights of the parties have been held to give rise to an estoppel by convention.[24] In the light of recent developments in equitable estoppel and estoppel by representation, it has been doubted whether the High Court would now follow its decision in *Con-Stan Industries*.[25]

A good illustration of estoppel by convention is to be found in the well known decision of the English Court of Appeal in *Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd*.[26] The case was concerned with a loan made by a Bahamian subsidiary of the defendant bank to a Bahamian subsidiary of the plaintiff company. The loan was made through the bank's subsidiary in order to avoid legislation which prevented foreign banks from trading in the Bahamas without permission. A guarantee intended to cover that loan was provided by the plaintiff to the defendant, rather than to the subsidiary of the defendant which lent the money. The guarantee covered moneys

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[22] (1986) 60 CLR 226, 244-5 (Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ) ('*Con-Stan Industries*').

[23] In *Eslea Holdings Ltd v Butts* (1986) 6 NSWLR 175, 186, a majority of the New South Wales Court of Appeal regarded this statement from *Con-Stan Industries* as *obiter dictum* and declined to follow it. The decision of the New South Wales Court of Appeal has been strongly and convincingly criticised: DJM Bennett, 'Equitable Estoppels and Related Estoppels' (1987) 61 *Australian Law Journal* 540, 549-551. Rory Derham, 'Estoppel by Convention' (Part II) (1997) 71 *Australian Law Journal* 976, 982 has suggested that, since estoppel by convention is a form of common law estoppel, it should, like other forms of estoppel at common law, be limited to assumptions of existing fact. As discussed below, text accompanying nn 127-144, however, common law estoppel has not always been restricted to representations of existing fact, and has occasionally been applied to assumptions relating to the rights of the parties.

[24] See, eg: *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] 1 QB 84; *Coghlan v SH Lock (Australia) Ltd* (1985) 4 NSWLR 158; *Eslea Holdings Ltd v Butts* (1986) 6 NSWLR 175; *Whittet v State Bank of New South Wales* (1991) 24 NSWLR 146. It now seems to be well accepted in England that estoppel by convention is not restricted to assumptions of fact: *Norwegian American Cruises A/S v Paul Mundy Ltd (The "Visafjord")* [1988] 2 Lloyd's Rep 343, 351 (Bingham LJ); *Hiscox v Outhwaite* [1992] 1 AC 105, 127 (Lord Donaldson); *Kenneth Allison Ltd v AE Limehouse & Co* [1992] 2 AC 105, 127 (Lord Goff).

[25] *Australian Consolidated Investments Ltd v England* (Supreme Court of South Australia, Doyle CJ, 1 November 1995) 183 *LSJS* 408, 436; *Caboche v Ramsay* (1993) 119 ALR 215, 238 (Gummow J); RP Meagher, WMC Gummow and JRF Lehane, *Equity: Doctrines and Remedies* (3rd ed, 1992) 408; Rory Derham, 'Estoppel by Convention - Part I' (1997) 71 *Australian Law Journal* 860, 866.

owed by the borrower to the defendant, and did not cover moneys owed by the borrower to the defendant's subsidiary.

In spite of that defect, the plaintiff and the defendant dealt with each other on the assumption that the guarantee given by the plaintiff covered the loan in question. On the faith of that assumption, the defendant granted various indulgences to the plaintiff and the borrower, including the release of certain security, and extending the time for repayment of the loan. When the borrower was ultimately unable to repay the loan, the defendant applied against the loan the proceeds of other securities which had been granted to the defendant by the plaintiff, leading to the present action by the liquidator of the plaintiff. The trial judge, Robert Goff J, treated the case as one of equitable estoppel. He held that representations were made on behalf of the plaintiff to the effect that the guarantee was binding and effective and covered the loan in question, and the defendant was so influenced by that representation that it would be unconscionable for the plaintiff to resile from it. Accordingly, the plaintiff was estopped from denying that the guarantee covered the loan in question.[27]

A majority of the Court of Appeal preferred to treat the case as one of estoppel by convention. According to Eveleigh LJ, the parties had negotiated on the assumption that the plaintiff had guaranteed the loan in question, the bank had acted on that assumption and the plaintiff was therefore prevented from denying the truth of it.[28] Brandon LJ held that the plaintiff and the defendant had negotiated and made various arrangements on the assumption that the guarantee bound the plaintiff to discharge the debt in question. The course of the negotiations was clearly influenced by that assumption, producing 'a classic example of the kind of estoppel known as estoppel by convention'.[29] While Eveleigh LJ regarded as crucial the fact that the defendant was relying on the estoppel as a defence to the plaintiff's action, and felt the defendant could not

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[26] [1982] 1 QB 84 ('*Texas Bank*').
[27] Ibid 107-9.
[28] Ibid 126.
[29] Ibid 131.

have succeeded in an action on the guarantee itself,[30] Brandon LJ would have allowed the defendant to found a cause of action on the estoppel.[31] The third member of the Court of Appeal, Lord Denning MR, dealt with the case on the basis of a 'general principle of estoppel'. That general principle applied where the parties to a contract were under a common mistake as to its meaning or effect, and had embarked on a course of dealing on the basis of that mistake. The effect of the estoppel was that the parties were bound by the conventional basis on which they had both conducted their affairs, and either could sue or be sued on that basis.[32]

Like Lord Denning MR in *Texas Bank*, several judgments in the High Court of Australia appear to have proceeded on the assumption that estoppel by convention forms part of the broader principle of estoppel *in pais* or estoppel by conduct. In *Thompson v Palmer*, for example, Dixon J regarded the adoption of an assumption as the conventional basis of a contractual relationship as one of the circumstances in which the party against whom an estoppel was claimed would be regarded as bearing sufficient responsibility for the adoption of an assumption to raise an estoppel *in pais*.[33] Two important points need to be noted about those statements. First, all of the statements were made by way of *obiter dicta*, and do not reflect considered decisions to unify the principles of estoppel by convention with estoppel *in pais*. Secondly, none of the statements explicitly suggested that estoppel by convention should be regarded as being subject to the same doctrinal requirements as estoppel *in pais*, although such a notion may perhaps be regarded as implicit.

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[30] Ibid 126.
[31] Ibid 131.
[32] Ibid 121-2.
[33] (1933) 49 CLR 507, 547. See also *Legione v Hateley* (1983) 152 CLR 406, 430 (Mason and Deane JJ); *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 676 (Dixon J). Kevin Lindgren, 'Estoppel in Contract' (1989) 12 *University of New South Wales Law Journal* 153, 156 has also suggested that notion of an 'assumption' adopted by Dixon J in *Thompson v Palmer* and *Grundt* as the basis of an estoppel provides a unifying element for estoppel by convention and estoppel by representation.

More recently, however, a clear distinction has been drawn by the High Court between estoppel by representation and estoppel by convention. In *Con-Stan Industries*, the Court said:

> Estoppel by convention is a form of estoppel founded not on a representation of fact made by a representor and acted on by the representee to his detriment, but on the conduct of relations between the parties on the basis of an agreed or assumed state of facts, which both will be estopped from denying.[34]

Although Spencer Bower and Turner regard estoppel by convention as a category of estoppel *in pais*, they suggest that the class of estoppels by convention is distinct from other estoppels arising *in pais* or by conduct.[35] They suggest that in the case of estoppel by convention it is the agreement, and not the misrepresentation, which is the foundation of the estoppel.

> It cannot be doubted that estoppel by convention is indeed a class of estoppel distinct from other estoppels *in pais* by reason of the fact that agreement, and not misrepresentation, is the source of its foundation; and it includes estoppels by deed, which have the same foundation to support them, but, added to it, the authority given to them by form.[36]

I will argue in this thesis that the basis of estoppel *in pais* is not the representor's misrepresentation, as Spencer Bower and Turner argue, but rather the representee's detrimental reliance, as the above statement by the High Court in *Con-Stan Industries* suggests. In other words, estoppel *in pais* is concerned more with the representee's plight than with the representor's conduct. Recent decisions tend to suggest, however, that estoppel by convention may well be consistent with both bases for estoppel *in pais*. There are two essential doctrinal questions which can help us to determine whether estoppel by convention should

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[34] (1986) 160 CLR 226, 244 (Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ).
[35] Spencer Bower and Turner, above n 4, 163.
[36] Ibid.

be regarded as part of the broader doctrine of common law estoppel. The first question is whether a person seeking to establish an estoppel by convention must show that the representor bears some responsibility for the representee's adoption of the relevant assumption: in other words, whether there is an 'inducement' requirement in estoppel by convention. The second question is whether detrimental reliance is required for estoppel by convention: that is, whether the representee must show that he or she has acted in reliance on the assumption so that he or she will suffer detriment if the representor is allowed to depart from the relevant assumption.

As to the first question, it appeared until recently to be accepted that a representor was not required to bear any particular responsibility for the assumption adopted by the representee. Spencer Bower and Turner indicate that this particular variety of estoppel arises not from the conduct of the representor, but from the mutual adoption of a state of affairs as the basis for a transaction.[37] That also appeared to be the approach taken by the English Court of Appeal in *Texas Bank*. In that case, Eveleigh and Brandon LJJ both distinguished between an estoppel *in pais*, which is based on a representor making an assertion and inducing the representee to act to his or her detriment on the basis of that assertion, and estoppel by convention, which is based on an agreed assumption between parties that a given state of facts between them is to be accepted as true.[38] In its subsequent decision in *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd (The "August Leonhardt")*, however, the Court of Appeal overturned the trial judge's finding that an estoppel by convention had arisen, on the basis that the representee had not done or said anything which was capable of giving rise to an estoppel.[39] In a joint judgment, the Court of Appeal held that all estoppels require some manifest representation which 'crosses the line' between representor and the representee:

> Similarly, in cases of so-called estoppels by convention, there must be some *mutually manifest conduct* by the parties which is based on a

[37] Above n 14, 157 *ff*.
[38] [1982] 1 QB 84, 125-6 (Eveleigh LJ), 130-1 (Brandon LJ). Cf 121 (Lord Denning MR).
[39] [1985] 2 Lloyd's Rep 28.

> common but mistaken assumption ... There cannot be an estoppel unless the alleged representor has said or done something, or failed to do something, with the result that ... his action or inaction has produced some belief or expectation in the mind of the alleged representee.[40]

That decision of the English Court of Appeal was applied in Australia in the same year in *Coghlan v SH Lock (Australia) Ltd*, where the New South Wales Court of Appeal unanimously held that it was a requirement of estoppel by convention that the party against whom the estoppel is raised has influenced the other party, such as by confirming their erroneous belief.[41] Samuels and Hope JJA found that the 'mutually manifest conduct' required in *The "August Leonhardt"* was established,[42] whereas McHugh JA found that no estoppel arose because there was no evidence that the conduct of the alleged representor induced any belief or expectation in the representee.[43] It seems clear, therefore, that some blameworthy conduct is required on the part of the representor to establish an estoppel by convention.[44]

Turning to the element of detrimental reliance, the courts have often proceeded on the assumption that a person seeking to assert an estoppel by convention was not required to show that he or she had acted in reliance on the state of affairs as assumed, nor that he or she would suffer any detriment as a result of the denial of

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[40] Ibid 34-5 (emphasis added).

[41] (1985) 4 NSWLR 158, 166-8 (Samuels JA, with whom Hope JA agreed), 177 (McHugh JA). The requirement in *The "August Leonhardt"* [1985] 2 Lloyd's Rep 28, 34 that there must be a 'representation which crosses the line between representor and representee' was again applied by the English Court of Appeal in *Norwegian American Cruises A/S v Paul Mundy Ltd (The "Visafjord")* [1988] 2 Lloyd's Rep 343, 350-1. More recently, Brooke J held that no estoppel by conduct arose in *Bank of Scotland v Wright* [1991] BCLC 244, 266 because there was no 'active encouragement or influencing' of the representee by the representor which was 'a necessary ingredient of this type of estoppel'. The requirement was also applied by Cohen J in *Ferno Holdings Pty Ltd v Lee* [1992] NSW Conv R 55-645, 59,691-2.

[42] (1985) 4 NSWLR 158,170 (Samuels JA).

[43] Ibid 177 (McHugh JA).

[44] It should be noted that Bennett, above n 23, 549 has argued that 'not much needs to cross the line' in order to give rise to an estoppel by convention and that *Coghlan v Lock* illustrates the extent to which courts are prepared to go in reducing the difficulty caused by the requirement that there be a crossing of the line. Derham, above n 23, 976-80 has conducted a detailed examination of the cases which tends to confirm that conclusion, despite the strength of the recent statements of principle. As Chapter 3 of this thesis will show, however, it could equally be said that very little is required to cross the line between representor and representee in order to establish any form of estoppel by conduct either at common law or in equity.

the correctness of the assumption.[45] It may be that questions of reliance are often not raised because it is implicit in the principle that the parties had entered into the transaction in question on the basis of the assumed facts.[46] There have, however, been relatively recent cases in which it has explicitly been held that detrimental reliance by a representee is not required to establish an estoppel by convention.[47]

In *Thompson v Palmer*, Dixon J treated estoppel by convention as a manifestation of estoppel *in pais* which requires proof that the representee has placed himself or herself in a position of material disadvantage.[48] It has been accepted in a number of cases since that detrimental reliance is required to establish an estoppel by convention.[49] In *National Westminster Finance NZ Ltd v National Bank of New Zealand Ltd*, the New Zealand Court of Appeal held that a party seeking to establish an estoppel by convention must establish that they have acted in reliance on an assumption and that they would thereby suffer detriment if the other party were allowed to resile from it.[50] The Court treated estoppel by convention as a 'manifestation of a single doctrine of estoppel' and, accordingly, required the representee to satisfy the more stringent requirements of estoppel by conduct.[51] In *The "August Leonhardt"*, the English Court of Appeal also appeared to require detrimental reliance. Although the representee had acted on the faith of the assumption (by failing to issue a writ on the assumption that an extension of time had been granted), the Court regarded it as crucial that he did

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[45] See, eg: *Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] 1 QB 84, 130-1 (Brandon LJ), 121-2 (Denning MR) and 126 (Eveleigh LJ).

[46] This is particularly clear in cases of estoppel by deed. Clarke J in *Offshore Oil NL v Southern Cross Exploration NL* (1985) 3 NSWLR 337, 346 observed that 'in that class of estoppel by convention concerned with recitals in deeds the authorities suggest that no detriment beyond the entry into the deed need be shown.'

[47] *Re Partick Corporation Ltd* [1981] 2 NSWR 328, 332; *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd* [1989] 2 Lloyd's Rep 570, 596, followed in *Cromcorp Quay Street Ltd v The Auckland Harbour Board* (1990) 10 ANZ Conv R 307, 310-11.

[48] (1933) 49 CLR 507, 547.

[49] In addition to the cases discussed below, see *Clark v Sheehan* [1967] NZLR 1038, 1040-1 and *Ferno Holdings Pty Ltd v Lee* [1992] NSW Conv R 55-645, 59,692.

[50] [1996] 1 NZLR 548, 549-50.

[51] The elements of estoppel by convention laid down by the Court of Appeal in *National Westminster Finance NZ Ltd v National Bank of New Zealand Ltd*, including the requirement of detrimental reliance, have subsequently been applied in rejecting a plea of estoppel by convention in *Rattrays Wholesale Ltd v Meredyth-Young & A'Court Ltd* [1997] 2 NZLR 363,

not do so in reliance on anything said or done by the representor.[52] Accordingly, although it has not always been so in the past, it seems that the courts are beginning to require a representee to establish detrimental reliance as a fact, rather than treating it as sufficient for a representee to establish that a transaction was entered into on the basis of a common assumption.[53]

In summary, although the matter is not yet free from doubt, it appears that the trend in recent decisions is towards treating estoppel by convention as an emanation of common law estoppel and imposing the same doctrinal requirements. Until recently, it may have been arguable that estoppel by convention was based on the principle that where parties have adopted certain facts as the basis of a transaction between them, then they should be bound by that adoption for the purposes of the transaction. Recent decision suggest, however, that estoppel by conduct is, like common law estoppel, based on an assumption of fact induced by the representor's conduct, and on detrimental reliance by the representee on the faith of that assumption. Accordingly, the development of a theory of estoppel by conduct in this thesis will proceed on the assumption that estoppel by convention is an emanation of the broader common law doctrine of estoppel by conduct, and is subject to the same doctrinal requirements.

(d) Estoppel *in pais*

The third principle referred to by Coke is the principle of estoppel *in pais*. There is some dispute as to the significance to be attached to the word *pais*, which derives from the old French word meaning country.[54] Coke considered the qualification *in pais* to distinguish estoppels arising 'in the countryside' from

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377-8 (Tipping J), and upholding a plea in *Helmin v Thorp* [1997] 3 NZLR 86, 92 (Fisher J).

[52] [1985] 2 Lloyd's Rep 28, 34. Similarly, in *Norwegian American Cruises A/S v Paul Mundy Ltd (The "Visafjord")* [1988] 2 Lloyd's Rep 343, 351-2, Bingham LJ noted that 'what is important for an estoppel by convention is that there should have been a common assumption *which has been acted upon*' (emphasis added).

[53] Indeed, Derham, above n 25, has suggested that 'the essence of conventional estoppel is the occurrence of a detrimental change of position by one party to a transaction on the faith of a common assumption in circumstances where it is unjust for the other party to depart from it.'

[54] Brown, above n 5, vol 2, 2072.

those arising by writing or record: 'By matter in pais [is meant] that a man shall by estopped in the Countrie, *without any writing*.'[55] The reference to the estoppel arising 'in the country' signifies that it has arisen between persons, and without any writing or record.[56] Peter Birks, on the other hand, has suggested that the word *pais* is used here in its more traditional legal sense, to mean 'the jury', which represented the country.[57] Estoppel *in pais*, according to Birks, is estoppel 'before the jury', the phrase *in pais* referring to the effect of estoppel in preventing evidence contrary to the assumed state of affairs from being given before the jury. The expression 'estoppel *in pais*' thus refers to estoppels arising in relation to facts.

Whichever of those two theories about the meaning to be attached to the expression *in pais* is correct, together they provide an understanding of the way in which an estoppel by conduct operates today at common law: it arises from conduct, rather than documents, and it has the essentially evidentiary effect of establishing a state of affairs by reference to which the rights of the parties are to be determined. The expression estoppel *in pais* is used in a number of different senses today.[58] In some cases it is confined to common law estoppel, encompassing estoppel by representation and estoppel by convention,[59] and in other cases it refers to both common law and equitable estoppels arising by conduct.[60] The expression has no generally accepted meaning and, as Patrick Parkinson has suggested, should now be abandoned as both 'ambiguous and obsolete.'[61] The expression 'common law estoppel' will be used in this thesis to refer to the principles of estoppel by conduct operating at common law, 'equitable estoppel' to refer to the principles of estoppel by conduct applied in

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[55] Coke, above n 6 (emphasis added).
[56] Parkinson, above n 8, 210 (n 58).
[57] Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *University of Western Australia Law Review* 1, 21.
[58] As Kevin Lindgren, above n 33, 154 has observed, since the expression *in pais* simply signifies that he estoppel has arisen at large, it is capable of referring to all estoppels other than those limited by reference to record or form.
[59] See, eg: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 413-5 (Brennan J).
[60] See, eg: *Legione v Hateley* (1983) 152 CLR 406, 430 (Mason and Deane JJ).
[61] Parkinson, above n 8, 211-2. Similarly, JS Ewart, *An Exposition of the Principles of Estoppel by Misrepresentation* (1900) 1 has suggested that estoppel *in pais* has 'very largely changed its character and ought to change its name.'

equity, and 'estoppel by conduct' to refer collectively to both of those sets of principles.

2. The Nature of Common Law Estoppel

(a) Essential operation

Although there is some disagreement between judges as to the scope of the contemporary doctrine of common law estoppel, the basis on which it operates has been clear in Australia since the great judgments of Dixon J in the 1930s in *Thompson v Palmer*[62] and *Grundt v Great Boulder Pty Gold Mines Ltd.*[63] The broad principle articulated by Dixon J in those judgments, which he called estoppel *in pais*, operates where one person (the representor) causes another person (the representee) to adopt an assumption of fact for the purposes of their legal relations. An estoppel arises where the representee has changed his or her position on the faith of the assumption, so that he or she will suffer detriment if the representor does not adhere to the assumption.[64] That basic formulation has been accepted in numerous recent judgments in the High Court.[65]

The effect of an estoppel at common law is to prevent the representor from denying that truth of the assumption which he or she has led the representee to adopt. The rights of the parties are then determined by reference to the state of affairs as assumed by the representee. As Deane J pointed out in *Waltons Stores (Interstate) Ltd v Maher*,[66] although it is often observed that estoppel at common law operates as a shield and not a sword, such observations are accurate only in a very limited sense. It is true in the sense that the effect of an estoppel at common law is not to create an independently enforceable right in one party against another, but rather 'it is to establish the state of affairs by reference to which the

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[62] (1933) 49 CLR 507.
[63] (1937) 59 CLR 641.
[64] *Thompson v Palmer* (1933) 49 CLR 507, 547; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674.
[65] See, eg: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 413 (Brennan J), 446 (Deane J), 458 (Gaudron J); *Commonwealth v Verwayen* (1990) 170 CLR 394, 409 (Mason CJ), 500 (McHugh J).

legal relationship between them is ascertained.'[67] An estoppel at common law can be used defensively, where an action which would otherwise be available to the plaintiff is not available on the assumed state of affairs.[68] It can also be used aggressively, to establish a state of affairs in which a cause of action is available, where that cause of action would not be available on the true state of affairs.[69]

(b) Assumptions of fact

As Mason and Deane JJ observed in *Legione v Hateley*,[70] and Mason CJ and Wilson J noted in *Waltons Stores*,[71] there is a long line of authority to support the proposition that, in order to support a case of common law estoppel by representation, the representation relied upon must be as to an existing fact, a promise or representation as to future conduct being insufficient. That restriction is often described as the rule in *Jorden v Money*, after the House of Lords case in which it was established.[72] The rule has often been stretched to breaking point, with judges going to some lengths to construe representations of future intention as representations of fact in order to avoid the operation of the rule.[73] Although

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[66] (1988) 164 CLR 387, 444-5 ('*Waltons Stores*').

[67] (1988) 164 CLR 387, 414 (Brennan J).

[68] In *Avon County Council v Howlett* [1983] 1 All ER 1073, for example, a cause of action for moneys had and received would have been available to the plaintiff had it not represented to the defendant that he was entitled to the money in question. The effect of the plaintiff being held to the assumed state of affairs was that no action was then available.

[69] In *Waltons Stores* (1988) 164 CLR 387, 463-4, Gaudron J (like the trial judge and the Court of Appeal below) held that an estoppel arose at common law which prevented the defendant from denying that it had entered into an agreement with the plaintiffs. The rights of the parties were, therefore, determined on the basis of the assumed state of affairs and the plaintiffs were able to maintain an action on the agreement which would not otherwise have been available. Other prominent cases in which common law estoppel has been used to establish a cause of action include *Seton, Laing, & Co v Lafone* (1887) 19 QBD 68 (conversion) and *Laws Holdings Pty Ltd v Short* (1972) 46 ALJR 563 (debt).

[70] (1983) 152 CLR 406, 432.

[71] (1988) 164 CLR 387, 398, citing *Jorden v Money* (1854) 5 HLC 185; 10 ER 868; *Maddison v Alderson* (1883) 8 App Cas 467, 473; *Chadwick v Manning* [1896] AC 231; *George Whitechurch Ltd v Cavanagh* (1902) AC 117, 130; *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305, 324; *Yorkshire Insurance Co Ltd v Craine* (1922) 31 CLR 27, 38; *Ferrier v Stewart* (1912) 15 CLR 32, 44; *Legione v Hateley* (1983) 152 CLR 406, 432.

[72] (1854) 5 HLC 185; 10 ER 868, discussed below under the heading: B. *Equitable Estoppel.*

[73] As Mason and Deane JJ observed in *Legione v Hateley* (1983) 152 CLR 406, 432, 'much judicial ingenuity [has] been employed in seeking to demonstrate that a statement of intention with respect to a future occurrence could amount to a statement of present fact.' A striking example is *Barns v Queensland National Bank Ltd* (1906) 3 CLR 925, 940, where the High Court construed a mortgagee's statement that it did not intend to exercise its power of sale as a representation of existing fact: that the mortgagee's prior demand for the secured debt was to be

there have recently been findings by members of the High Court that the rule in *Jorden v Money* is no longer good law in Australia,[74] such a view has not yet commanded a majority in the High Court. Accordingly, common law estoppel remains applicable only to representations of existing fact. The continued existence of a separate doctrine of common law estoppel, ostensibly restricted to representations of existing fact, received majority support in *Waltons Stores*[75] and was further supported in *Commonwealth v Verwayen.*[76] The contemporary operation of the doctrine was described by Brennan J as follows:

> A party who induces another to make an assumption that a state of affairs exists, knowing or intending the other to act on that assumption, is estopped from asserting the existence of a different state of affairs as the foundation of their respective rights and liabilities if the other has acted in reliance on the assumption and would suffer detriment if the assumption were not adhered to.[77]

Mason CJ has suggested that common law estoppel has expanded beyond its evidentiary function into a substantive doctrine.[78] Since the doctrine is occasionally applied to an assumptions of rights, it is not entirely accurate to describe it as an evidentiary doctrine.[79] In most cases it is applied in relation to assumptions of fact, however, and in such cases its effect is simply to compel adherence to an assumption of fact. Even where it is applied to assumptions of

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regarded as not having been made.

[74] See *Waltons Stores* (1988) 164 CLR 387, 452 (Deane J, who then stopped just short of making such a finding); *Foran v Wight* (1989) 168 CLR 385, 435 (Deane J), 411-2 (Mason CJ); *Commonwealth v Verwayen* (1990) 170 CLR 394, 413 (Mason CJ), 444-5 (Deane J).

[75] (1988) 164 CLR 387, 397-9 (Mason CJ and Wilson J) (who called it common law estoppel), 413-5 (Brennan J) (estoppel in pais), 458-9 (Gaudron J) (common law or evidentiary estoppel).

[76] (1990) 170 CLR 394 ('*Verwayen*'), 453-4 (Dawson J), 499-500 (McHugh J). See also *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466, 472 (Priestley JA).

[77] *Waltons Stores* (1988) 164 CLR 387, 413, citing *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305, 327-328; *Thompson v Palmer* (1933) 49 CLR 507, 547; *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723, 734; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 657, 674, 676.

[78] *Verwayen* (1990) 170 CLR 394, 412 (Mason CJ).

[79] See above, text accompanying n 3. For a discussion of cases in which common law estoppel has operated in relation to assumptions as to rights, see below, nn 132-140 and accompanying text.

existing rights, its effect is simply to prevent the denial of those rights.[80] Accordingly, the common law doctrine is not substantive, in the sense that it is not a source of independent rights. In this significant respect, the principle of estoppel applied at common law contrasts sharply with its equitable counterpart, which goes beyond merely precluding the denial of existing facts or rights. As the following discussion will show, equitable estoppel is itself a source of independent rights or equities, which are satisfied by the granting of appropriate relief.

B. *Equitable Estoppel*

1. A Brief Historical Sketch

Unlike common law estoppel, equitable estoppel has been allowed to develop into a substantive doctrine, principally because it has not been subjected to the full rigours of the rule in *Jorden v Money*. As noted above, from the time of *Jorden v Money* until very recently,[81] it has been accepted that an estoppel could only arise at common law from an assumption of existing fact, and that the principle of estoppel has no application to promises or representations as to future conduct. Although the restriction imposed in *Jorden v Money* clearly applied to estoppel in equity as well as at common law,[82] two lines of authority evince the reluctance on the part of equity judges to accept that restriction. It was the recognition of estoppels arising from promises, and relating to the future conduct of the promisor, which led ultimately to the development of a substantive doctrine of estoppel in equity.

Equitable estoppel has its origins in the equitable jurisdiction to make good representations, which has been thoroughly examined in contemporary

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[80] See the cases discussed below, nn 132-140 and accompanying text

[81] See above, n 74 and accompanying text.

[82] See, eg, *Piggott v Stratton* (1859) 1 De GF & J 33; 45 ER 271, 278. As JG Starke and PFP Higgins, *Cheshire and Fifoot's Law of Contract* (Aust ed, 1966) 687 observed: 'The plain fact is that *Jorden v. Money* was initiated in a court of equity and was ultimately decided by the House of Lords sitting as a court of equity prior to the English Judicature Act of 1873, and it was at no time suggested in that case that equity viewed the matter differently from the common

literature.[83] Prior to the decision in *Jorden v Money*, the equitable jurisdiction to make good representations clearly extended to representations as to the existing rights of the parties and representations as to the future conduct of the representor. The leading case is *Hammersley v De Biel*, in which Lord Cottenham held that 'a representation made by one party, for the purpose of influencing the conduct of the other party, and acted upon by him, will in general be sufficient to entitle him to the assistance of this court for the purpose of realising such representation.'[84] The case concerned a representation made by a man to his prospective son in law relating to the representor's intention to settle 10,000 pounds on his daughter and her heirs in his will. The House of Lords upheld the decisions of the courts below that the representation, being made in contemplation of the marriage, and acted upon by the marriage, was enforceable in a court of equity.

Although all members of the House of Lords in *Hammersley v De Biel* held that the arrangement was enforceable on equitable principles,[85] the decision was later justified by the House of Lords as based on contract.[86] In *Jorden v Money* the House of Lords denied that the jurisdiction to make good representations allowed a court of equity to enforce non-contractual promises. The plaintiff in *Jorden v Money* commenced proceedings in the Court of Chancery to prevent the defendant from enforcing a judgment at law on a bond given by the plaintiff to the defendant some years previously. The plaintiff claimed that the defendant had made numerous representations that she would not enforce the bond against the plaintiff. The plaintiff acted in reliance on those representations in marrying. Although the plaintiff succeeded before the Master of the Rolls and the Court of Appeal in Chancery, a majority of the House of Lords held that the representation

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law.'

[83] LA Sheridan, 'Equitable Estoppel Today' (1952) 15 *Modern Law Review* 325; David Jackson, 'Estoppel as a Sword' (Parts 1 & 2) (1965) 81 *Law Quarterly Review* 84 & 223; Ian Davidson, 'The Equitable Remedy of Compensation' (1982) 13 *Melbourne University Law Review* 347, 356-370; Francis Dawson, 'Making Representations Good' (1982) 1 *Canterbury Law Review* 329; PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (1985) 59, 62-71.

[84] (1845) 12 Cl & F 45; 8 ER 1312, 1320.

[85] Ibid 1327 (Lord Lyndhurst), 1329 (Lord Brougham), 1331 (Lord Campbell).

[86] *Maunsell v Hedges* (1854) 4 HLC 1039; 10 ER 769, 776 (Lord Cranworth LC), 777 (Lord St Leonards); see Mark Lunney, 'Jorden v Money - A Time for Reappraisal?' (1994) 68

was not enforceable. The House of Lords held that the doctrine by which representations were made good at common law and in equity 'does not apply where the representation is not a representation of fact, but a statement of something which the party intends to do or does not intend to do.'[87]

It seems clear that the House of Lords' decision in *Jorden v Money* should have restricted the application of all estoppels, both at law and in equity, to representations of fact. As a number of commentators have pointed out, however, the equity judges were not entirely constrained by the decision.[88] Two lines of authority emerged which effectively represented exceptions to the rule in *Jorden v Money*, although they were not acknowledged as such, and were not at first described as instances of estoppel. The first line of authority involved the application of the doctrines of encouragement and acquiescence, which allowed relief to be granted where the owner of land had encouraged or allowed a person to assume or expect rights in that land, and the latter had acted on the basis of that assumption or expectation. Those doctrines, which became known as proprietary estoppel, recognised that a cause of action existed against the landowner where the relevant assumption or expectation had been acted upon. Although those principles may be regarded as being inconsistent with *Jorden v Money*, their continued existence was recognised only two years after the House of Lords' decision was handed down.[89]

Australian Law Journal 559, 568.

[87] (1854) 5 HLC 185; 10 ER 868, 882 (Lord Cranworth LC), similarly, 886 (Lord Brougham). The demise of the equitable jurisdiction to make good representations in *Jorden v Money* and other cases has been attributed to the increased emphasis on self reliance in the Victorian era, and the notion of the assumption of obligation through bargain, which is at the heart of classical contract theory: PS Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 458; Finn, above n 83; DW Greig and JLR Davis, *The Law of Contract* (1987) 24-6; PA Ridge, 'The Equitable Doctrines of Part Performance and Proprietary Estoppel' (1988) 16 *Melbourne University Law Review* 725, 727-9. This relationship between classical contract theory and estoppel is discussed in Andrew Robertson, 'Situating Equitable Estoppel Within the Law of Obligations' (1997) 19 *Sydney Law Review* 32, 33-37.

[88] Lunney, above n 86, 570-3; Dawson, above n 83, 334-5; Fiona Burns, 'The "Fusion Fallacy" Revisited' (1993) 5 *Bond Law Review* 152, 164-5. Like the common law judges, the equity judges were also ingenious in construing statements of intention as representations of existing fact in order to avoid the operation of the rule, see, eg: the decision of the Court of Appeal in Chancery in *Piggott v Stratton* (1859) 1 De GF & J 33; 45 ER 271, discussed by Samuel Stoljar, 'Estoppel and Contract Theory' (1990) 3 *Journal of Contract Law* 1, 4-5.

[89] *Ramsden v Dyson* (1866) LR 1 HL 129, 140 (Lord Cranworth LC); 168 (Lord Wensleydale), 170 (Lord Kingsdown). The narrow statement of the doctrine estoppel by acquiescence by Lord Cranworth may be attributable to a concern not to offend the principle he laid down in *Jorden v*

The second line of authority which may be regarded as an equitable exception to *Jorden v Money* was the principle that applied where a party to a contract led a second party to believe that certain contractual rights would not be enforced. Where the second party had changed their position on the faith of that assumption, the first would not be allowed to enforce those rights.[90] Again the principle was not originally described as an estoppel, but it later developed, through Justice Denning's famous *dicta* in *Central London Property Trust Ltd v High Trees House Ltd*,[91] into a principle which became known as promissory estoppel. As King CJ observed in *Je Maintiendrai Pty Ltd v Quaglia*, the principle of promissory estoppel 'appears to run directly counter to the decision of the House of Lords in *Jorden v Money*'.[92]

Thus, notwithstanding the decision of the House of Lords in *Jorden v Money*, two broad principles were subsequently applied in equity which had the effect of holding parties to promises and representations relating to their future conduct, in circumstances in which those promises and representations had been acted upon by the representee or promisee. Those principles of proprietary[93] and promissory[94] estoppel were cautiously applied in Australian courts until 1988, when the High Court rationalised the equitable principles of estoppel in *Waltons Stores*.[95] In *Waltons Stores*, the High Court recognised that the doctrines of proprietary estoppel and promissory estoppel were emanations of a broader

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Money (1854) 5 HLC 185; 10 ER 868, 881-2. The broader statement of estoppel by acquiescence by Lord Kingsdown in *Ramsden v Dyson*, on the other hand, seems quite inconsistent with *Jorden v Money*: see Chapter 3 and Lunney, above n 86, 572.

[90] *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439; *Birmingham and District Land Co v London and North Western Railway Co* (1888) 40 Ch D 268.

[91] [1947] 1 KB 130.

[92] (1980) 26 SASR 101, 102. It is interesting to note that the *ratio decidendi* of *Jorden v Money* was described by Lord Campbell LC in *Piggott v Stratton* (1859) 1 De GF & J 33; 45 ER 271, 278 in terms which directly contradict the *High Trees* principle: 'that where a person possesses a legal right, a Court of Equity will not interfere to restrain him from enforcing it, though, between the time of its creation and that of his attempt to enforce it, he has made representations of his intention to abandon it.'

[93] See *Hamilton v Geraghty* (1901) 1 SR (NSW) (Eq) 81; *Raffaele v Raffaele* [1962] WAR 29; *Jackson v Crosby (No 2)* (1979) 21 SASR 280; *Cameron v Murdoch* [1983] WAR 321; *Riches v Hogben* [1986] Qd R 315.

[94] See *In the Marriage of Duncan* (1978) 4 Fam LR 282; *Je Maintiendrai Pty Ltd v Quaglia* (1980) 26 SASR 101; *Re Ward; Official Trustee v Dabnas Pty Ltd* (1984) 3 FCR 112; *Miller v Barrellan (Holdings) Pty Ltd* (1981) 2 BPR 9543.

principle of estoppel operating in equity, which is of general application.[96] It is that broad principle of equitable estoppel recognised in *Waltons Stores*, and refined in the High Court's subsequent decision in *Verwayen*[97] which, along with common law estoppel, forms the subject of this thesis.

2. The Nature of the Doctrine

Although there were some important differences of opinion between members of the High Court in *Waltons Stores* and *Verwayen* as to the nature of equitable estoppel, there was broad agreement as to the circumstances in which it operates.[98] The doctrine operates where a representor induces a representee to adopt an assumption as to the representor's future conduct or the legal rights of the representee, and the representee acts on the faith of that assumption in such a way that the representee will incur significant detriment if the assumption is not adhered to. The three core elements required to establish an equitable estoppel are an assumption, inducement and detrimental reliance: the representee must have adopted an assumption (assumption), which was induced by the conduct of the representor (inducement), and the representee must have altered his or her position on the faith of the assumption so that material detriment will be suffered if the representor is allowed to depart from the assumption (detrimental reliance). It is often suggested that a fourth element must also be made out in order to establish an estoppel in equity: that departure from the assumption by the representor would be unconscionable in the circumstances (unconscionability). The effect of the estoppel is to raise an equity against the representor, which the court must satisfy by granting relief which is the minimum necessary to prevent any detriment being suffered by the representee.

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[95] (1988) 164 CLR 387.

[96] In *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466, 472, Priestley JA observed that the decision in *Waltons Stores* allows us to say that cases described as estoppel by encouragement, estoppel by acquiescence, proprietary estoppel and promissory estoppel are all species of equitable estoppel.

[97] (1990) 170 CLR 394.

[98] Those areas of disagreement will be examined below and in Chapters 2-7.

A number of important questions remain unresolved after the High Court's decisions in *Waltons Stores* and *Verwayen*. First, does equitable estoppel apply to assumptions of existing fact? Secondly, does equitable estoppel have exclusive operation in relation to assumptions as to rights? Thirdly, does equitable estoppel itself provide a cause of action? Those three broader questions will be addressed briefly below. Other unresolved questions relate to specific elements of equitable estoppel, and they will be addressed in detail in Chapters 2-7 below. Chapter 2 will consider what is the fundamental purpose or rationale of equitable estoppel. Chapter 3 will consider what is the threshold requirement for establishing an equitable estoppel: is a representation or promise required, or is the court merely concerned with whether an assumption has been adopted by the representee? Chapter 4 will consider the nature of the detrimental reliance requirement, and the level of proof demanded. Chapter 5 will consider the nature of the reasonableness requirement: is the representee required to act reasonably in adopting and acting upon the assumption, or must the representor reasonably expect reliance, or both? Chapter 6 will consider whether there is an additional requirement in equity that it must be unconscionable for the representee to depart from the assumption in the circumstances. The question of knowledge will also be addressed in Chapter 6: whether the representor must know of or expect reliance by the representee. Finally, Chapter 7 will address the important question of remedy: how should the courts give effect to an estoppel once it is made out?

(a) Does equitable estoppel apply to assumptions of fact?

The first unresolved question relates to the scope of the doctrine of equitable estoppel. Two different views can be discerned in the recent judgments. The narrow view of equitable estoppel is that the doctrine applies only to assumptions relating to the legal rights of the parties or the future conduct of the representor, with common law estoppel having exclusive application to assumptions of existing fact. The broad view is that the equitable doctrine can, in addition to its exclusive application to assumptions of future conduct and rights, apply to assumptions of existing fact. While the former view is difficult to justify

historically, acceptance of the latter would result in overlap and inconsistency between the common law and equitable principles.

In *Waltons Stores*, the narrow view of equitable estoppel appeared to be accepted by Mason CJ and Wilson J, although they did not directly address the question. Deane J recognised that estoppel by representation spanned the gulf between common law and equity, and operated indifferently at common law and in equity.[99] The approach taken by Deane J shows that the question of the scope of equitable estoppel is only a live question if one accepts the existence of an equitable doctrine of estoppel that operates differently from that applied at common law. The doctrine of equitable estoppel articulated by Brennan J in *Waltons Stores* was clearly quite different from common law estoppel since the former was itself 'a source of legal obligation', while the latter simply operated to establish a state of affairs by reference to which the rights of the parties were determined.[100] It was clear that Brennan J adopted the narrow view of equitable estoppel: the principle he applied operated only in relation to assumptions 'that a particular legal relationship existed' between representor and representee.[101] Similarly, Gaudron J differentiated between common law and equitable estoppel on the basis that the former operated by reference to assumptions of fact, while the latter operated by reference to an assumption of rights.[102]

The judgments of Brennan and Gaudron JJ in *Waltons Stores* clearly proceeded on the footing that equitable estoppel operated only in relation to assumptions of future conduct and rights, leaving assumptions of existing fact to be dealt with at common law.[103] Two commentators have argued, however, that equitable estoppel can cover all of the territory presently covered by common law

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[99] (1988) 164 CLR 387, 447.
[100] Ibid 416.
[101] Ibid 428.
[102] Ibid 458.
[103] In applying the principles laid down in *Waltons Stores* in *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466, 472, Priestley JA distinguished the doctrines of common law and equitable estoppel on the basis that common law estoppel operates upon representations of existing fact, while equitable estoppel operates upon representations or promises as to future conduct, including promises as to legal relations. Implicit in that distinction is a denial of the operation of equitable estoppel in relation to representations of existing fact.

estoppel.[104] Although in *Keate v Phillips* Bacon VC held that the doctrine of estoppel was 'purely legal' and could not be applied in a court of equity,[105] it is clear that courts of equity have historically recognised estoppels arising from representations of fact.[106] The equitable jurisdiction to make representations good was often invoked in relation to representations of fact.[107] There is also a long line of equity cases in which estoppels have arisen from representations to the effect that a representor had no interest in a particular item of property.[108]

Although this century the doctrine of estoppel by representation of fact has principally been applied at common law, three important nineteenth century cases show that the principle was also applied in equity. First, in *West v Jones*, Lord Cranworth VC upheld a plea of estoppel arising from a representation of fact in the Court of Chancery.[109] The plea was successfully relied upon by the plaintiff in that case in support of his claim for a declaration as to the amount secured by a mortgage which he held from the defendant. The defendant was held to the assumption of fact which he had induced the plaintiff to adopt: that certain moneys had been advanced under the mortgage. Lord Cranworth observed that the applicable principle of estoppel was 'familiar not only to Courts of Equity but also to courts of law'.[110] Secondly, the decision of the House of Lords in *Jorden v Money* was based on the principle that estoppel in equity was limited to representations of existing fact.[111] The third important case was the decision of the English Court of Appeal in *Low v Bouverie*,[112] which proceeded on the basis that the principle of estoppel by representation of fact operated consistently at

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[104] Alec Leopold, 'Estoppel: A Practical Appraisal of Recent Developments' (1991) 7 *Australian Bar Review* 47, 51; Mark Lunney, 'Towards a Unified Estoppel: The Long and Winding Road' [1992] *The Conveyancer and Property Lawyer* 239, 246.
[105] (1878) 18 Ch 560, 577.
[106] As Derham has noted, above n 23, 984, equity has a concurrent jurisdiction with the common law in relation to estoppel by representation as to an existing state of affairs.
[107] Prominent examples include *Evans v Bicknell* (1801) 6 Ves 174; 31 ER 927 and *Burrowes v Lock* (1805) 10 Ves 470; 32 ER 927.
[108] See, eg, *Hunt v Carew* (1649) Nel 46; 21 ER 786; *Hobbs v Norton* (1682) 1 Vern 136; 23 ER 370; *Hunsden v Cheyney* (1690) 2 Vern 156; 23 ER 703; *Draper v Boralace* (1699) 2 Vern 370; 23 ER 833; *Ibbottson v Rhodes* (1706) 2 Vern 554; 23 ER 958; *Mocatta v Murgatroyd* (1717) 1 P Wms 394; 24 ER 440.
[109] (1851) 1 Sim (NS) 205; 61 ER 79.
[110] Ibid 81. See also at 83.
[111] (1854) 5 HLC 185; 10 ER 868, esp at 880-1 (Lord Cranworth LC).
[112] [1891] 3 Ch 82.

common law and in equity.[113] Although no estoppel was found to arise in that case, the Court of Appeal's treatment of the principles of estoppel has been extremely influential in subsequent estoppel cases, both in equity and at common law.

It is, therefore, clear that a principle of estoppel arising from assumptions of fact has been applied in Courts of Equity for some time.[114] It is also clear that the principle has operated in equity in the same way as it has at law.[115] The effect of the estoppel has been to establish a state of affairs by reference to which the rights of the parties are established. The difficult question, then, is whether equity will continue to treat relied-upon assumptions of fact in the same way as the common law, and will simply hold the representor to the relevant assumption in each case, or whether assumptions of fact will be dealt with in the same way as assumptions of rights or future conduct. If the latter view prevailed, then reliance upon an assumption of fact induced by another party would raise an equity in favour of the representee, and the court would have to fashion relief to give effect to that equity in accordance with recognised principles. The question of the scope of equitable estoppel is a significant one because of the different ways in which equitable estoppel and common law estoppel operate. From a representee's point of view, it will be preferable to invoke the equitable doctrine in those situations in which no cause of action is available on the assumed state of affairs, since the equitable doctrine itself appears to provide a cause of action. The common law doctrine may, however, provide a better remedy for the representee in some situations, since it provides a complete bar to the representor relying on the true state of affairs.[116]

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[113] Ibid, esp at 111-3 (Kay LJ).

[114] See, eg: *Waltons Stores* (1988) 164 CLR 387, 447-8 (Deane J) and *Verwayen* (1990) 170 CLR 394, 409-10 (Mason CJ), 500 (McHugh J).

[115] *Waltons Stores* (1988) 164 CLR 387, 447 (Deane J). Meagher Gummow and Lehane, above n 25, 406 have observed that since *Pickard v Sears* (1837) 6 Ad & El 469; 112 ER 179 estoppel by representation has had the same attributes at law and in equity. Spencer Bower and Turner, above n 4, 12 maintained in 1977 that 'no satisfactory high authority is discoverable offering any firm foundation for the view that estoppel in equity is different in any essential respect from estoppel at common law, whatever may have been the case in the 19th century when the doctrine was in its embryonic stages.'

[116] As Chapter 7 will show, the judgments of the High Court in *Verwayen* indicate that the remedy provided by equitable estoppel should be designed to reverse the detriment suffered by the representee, rather than to fulfil his or her expectations.

The difference between the effects of common law and equitable estoppel can be illustrated by reference to the facts before the English Court of Appeal in *Avon County Council v Howlett.*[117] The action was brought by the plaintiff to recover payments made under a mistake of fact to the defendant, its employee. The defendant queried the payments, in response to which the plaintiff made representations which led the defendant to believe that he was entitled to treat the money as his own. On the faith of that belief, the defendant expended some of the money on things he would not otherwise have bought, and omitted to claim social security benefits to which he would have been entitled.[118] The trial judge held that the plaintiff's claim to recover the moneys was barred only to the extent of the sum spent and the benefits forgone. That decision was overturned by the Court of Appeal, on the basis that an estoppel by representation arose which did not operate only to the extent of the detriment suffered by the representee, but barred the whole of the plaintiff's claim to recover the moneys. The notion that estoppel by representation could operate *pro tanto* was described by Slade LJ as being 'contrary to principle and authority.'[119] The contemporary Australian doctrine of common law estoppel would have the same result: its effect would be to establish a state of affairs by reference to which the rights of the parties would be determined. Under the represented or assumed state of affairs, no action would be available to the plaintiff.[120]

The contemporary Australian doctrine of equitable estoppel may, however, produce quite a different result if the situation arose in Australia today. A person in the defendant's position might plead equitable estoppel on the basis that

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[117] [1983] 1 All ER 1073. The case will be discussed in more detail in the context of estoppel remedies in Chapter 7.

[118] There was in fact evidence that the defendant had spent all of the money, but Eveleigh and Slade LJJ decided the case on the facts pleaded by the defendant, which revealed a change of position equivalent in value to approximately half of the amount claimed by the plaintiff.

[119] [1983] 1 All ER 1073, 1088.

[120] The inflexibility of common law estoppel in this context was noted by the High Court in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 385, where Mason CJ, Deane, Toohey, Gaudron and McHugh JJ observed that a number of writers support a change of position defence to restitutionary claims, 'particularly in view of the inflexibility of the related doctrine of estoppel, as evidenced by *Avon CC v Howlett* where the Court of Appeal held that estoppel could not operate pro tanto.'

equitable estoppel extends to assumptions of fact, or on the basis that the belief induced by the plaintiff's representation was an assumption as to the future conduct of the plaintiff (that it would not enforce its right to recover the money) or the rights of the parties (that the defendant was entitled to receive the payments). The effect of an equitable estoppel would not be to establish an assumed state of affairs, but rather to raise an equity in favour of the defendant. According to the approach adopted by several members of the High Court in *Verwayen*, the court should satisfy that equity by granting the minimum relief necessary to prevent the defendant from suffering detriment as a result of his reliance on the relevant assumption.[121] The court could do that by allowing the plaintiff's action only to extent of the amount unspent by the plaintiff less the income forgone, or by allowing the action subject to the defendant's right to be compensated for the expenditure and income forgone.

The doctrine of equitable estoppel may, therefore, produce quite different results from its common law counterpart in some situations. The scope of the equitable doctrine is thus an important issue, with significant practical consequences. The question whether equitable or common law estoppel should be applied will potentially be an important one in all cases in which the detriment suffered by the representee in reliance on the relevant assumption exceeds the value of a benefit which they expected, or assumed they had, on the facts as represented by the representor.[122]

This question of the scope of equitable estoppel was considered at some length by Kirby P in *Lorimer v State Bank of New South Wales.*[123] His view was that the

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[121] See Chapter 7 below.

[122] Andrew Beech, 'The Remedy for Estoppel: Identifying and Preventing Detriment' in Robyn Carroll (ed), *Civil Remedies - Issues and Developments* (1996) 156, 164 has suggested that, because of the remedial distinction between common law and equitable estoppel, it will always be to the representee's advantage to establish an estoppel at law, rather than in equity. That statement is not, however, entirely accurate. It will be preferable for a representee to establish an equitable estoppel in those situations in which the assumed state of affairs does not provide the representee with a cause of action. The fact that equitable estoppel operates as a substantive source of rights will then make it more advantageous to the representee than its common law counterpart.

[123] (New South Wales Court of Appeal, Kirby P, Priestley JA and Handley JA, 5 July, 1991) 19-24.

modern authorities contemplate that equitable estoppel applies to assumptions of fact as well as assumptions as to future conduct. This, he suggests, is confirmed by Justice Brennan's suggestion that an equitable estoppel may be founded upon an assumption that a particular legal relationship existed between the parties.[124] Accordingly, Kirby P suggested, the same assumption could conceivably found both an estoppel *in pais* at common law and an equitable estoppel. As Kirby P has suggested, the result of such a state of affairs is a conflict between the common law and equity, since the courts give effect to the different estoppels in entirely different ways. The effect of a common law estoppel is to hold the representor to the assumed state of affairs and to determine the rights of parties on the basis of that state of affairs. The effect of an equitable estoppel, on the other hand, is to raise an equity in favour of the representee, which the court must satisfy by the granting of relief which prevents or reverses the detriment suffered by the representee as a result of his or her reliance.

Any conflict between the common law and equitable doctrines must be resolved in favour of the equitable doctrine, as Kirby P has suggested. Under the statutes in force in each Australian state and territory which re-enact the provisions of the English Judicature Act of 1873, where there is any conflict or variance between the rules of equity and the rules of the common law relating to the same matter, the rules of equity prevail.[125] The result is that the equitable doctrine is to be applied in situations where both are potentially applicable. If the view of Kirby P is right, then that would extend to every situation in which the common law doctrine of estoppel by conduct applies. Common law estoppel must, according to this view, be regarded as a dead letter, which has been superseded by the substantive doctrine of equitable estoppel.

It must be recalled that common law estoppel will only be supplanted by equitable estoppel if the latter is regarded as extending to representations of fact.

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[124] *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 428-9. One might question, however, whether Justice Brennan's reference to an assumption that a particular legal relationship exists between the parties can unquestioningly be treated as a reference to as an assumption of fact. See below, text accompanying nn 127-143.

[125] Supreme Court Act 1933 (ACT), s 33; Law Reform (Law and Equity) Act 1972 (NSW), s 5; Supreme Court Act (NT), s 68; Supreme Court Act 1995 (Qld), s 249; Supreme Court Act 1935 (SA), s 28; Supreme Court Civil Procedure Act 1932 (Tas), s 11(10); Supreme Court Act 1986

That question has not yet been squarely addressed by the High Court. Since most members of the High Court have, in its recent decisions, assumed the continued existence of common law estoppel, it must also be assumed that equitable estoppel is confined to assumptions relating to the representor's future conduct and the legal rights of the parties, leaving common law estoppel with exclusive application to assumptions of existing fact. The notion that common law estoppel retains its exclusive application to situations involving assumptions of existing fact has been justified by Andrew Beech on the basis that where common law estoppel operates 'there is nothing to enliven the jurisdiction of a court of equity on an argument of estoppel'.[126] In other words, since the common law adequately protects the position of the representee, equitable intervention is not justified.

(b) Which estoppel applies to assumptions of rights?

If common law estoppel does retain its exclusive application to representations of existing fact, then another important question of demarcation arises. Is an assumption relating to the existing legal rights of the representee covered by equitable estoppel, or is it regarded as an assumption of fact, which is dealt with under common law estoppel? In *Waltons Stores*, Gaudron J distinguished between common law and equitable estoppel on the basis that the former applied to assumptions of fact, while the latter applied to assumptions as to rights.[127] It is possible to cite numerous cases of estoppels arising in equity from assumptions as to rights, particularly amongst the proprietary estoppel cases. While there have been many proprietary estoppel cases arising from assumptions relating to the representor's future conduct,[128] there have also been several that have arisen from

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(Vic), s 29(1); Supreme Court Act 1935 (WA), s 25(12).

[126] Above n 122, 160.

[127] (1988) 164 CLR 387, 458.

[128] Ie: that the representor would transfer certain property to the representee, either *inter vivos* or by will, or would allow the representee to occupy or use the land in some way. Examples of such cases include: *Plimmer v Wellington Corporation* (1884) 9 HLC 699; *In re Whitehead* [1948] NZLR 1066; *Inwards v Baker* [1965] 1 All ER 446; *Pascoe v Turner* [1979] 2 All ER 945; *Greasely v Cooke* [1980] 1 WLR 1306; *Crabb v Arun District Council* [1976] 1 Ch 179; *Jackson v Crosby (No 2)* (1979) 21 SASR 280; *Riches v Hogben* [1986] 1 Qd R 315; *Collin v Holden* [1989] VR 510.

mistaken assumptions relating to the existing rights of the parties.[129] The availability in a court of equity of this type of proprietary estoppel, based on an assumption of existing rights rather than future conduct, has been confirmed in several well-known statements of principle.[130] Accordingly, it cannot be suggested that equitable estoppel is limited in its application to assumptions relating to the future conduct of the representor.

It is not, however, historically accurate to suggest that courts of equity have enjoyed exclusive jurisdiction in relation to assumptions as to rights.[131] There have been many cases at common law in which representations as to the legal rights of the parties have been treated as representations of existing fact.[132] In *Mooregate Mercantile Co Ltd v Twitchings*, Lord Denning MR held that the common law principle of estoppel by conduct 'applies to an assumption of ownership or absence of ownership.'[133] Perhaps the clearest and most common instance of common law estoppel operating in relation to an assumption of rights

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[129] Eg: *Huning v Ferrers* (1711) Gilb Eq 85; 25 ER 370 (representee built on land assuming he had possession under a valid lease); *Savage v Foster* (1723) 9 Mod 35; 88 ER 299 (representee purchased and build on land assuming he was obtaining good title); *Steed v Whitaker* (1740) Barn Ch 220; 27 ER 621 (representee built on mortgaged property on the assumption it was unencumbered); *Hardcastle v Shafto* (1793) 1 Anst 184; 145 ER 839 (representees spent money improving land on the assumption that they had possession under a valid lease); *Hamilton v Geraghty* (1901) 1 SR (NSW) (Eq) 81 (representee built on land assuming it was his own); *Attorney General to HRH Prince of Wales v Collom* [1916] 2 KB 193 (representee expended money on improvements to a house, believing it to be her own).

[130] *Dann v Spurier* (1802) 7 Ves 231; 32 ER 94, 95; *Ramsden v Dyson* (1866) LR 1 HL 129, 140; *Willmott v Barber* (1880) 15 Ch D 96, 105-6; *Svenson v Payne* (1945) 71 CLR 531, 539.

[131] Spencer Bower and Turner, above n 4, 38-42 note that there have been several cases in which estoppels have arisen from statements of fact 'accompanied by, or involving, an inference of proposition of law'. They argue that inextricably mixed statements of fact and law are properly treated as statements of fact, and if as a result of the representor's ambiguous use of language it is impossible to say with certainty which is the proper construction, the statement is deemed one of fact on the basis of the *contra proferentem* rule. On the application of common law estoppel to assumptions of mixed fact and law, see also *Waltons Stores* (1988) 164 CLR 387, 415 (Brennan J).

[132] Eg: *Pickard v Sears* (1837) 6 Ad & El 469; 112 ER 179 (representee purchased goods on the assumption that representor had no interest in them); *Bank of Australasia v Adams* (1890) 8 NZLR 119 (directors signed bond in the belief they were incurring no personal liability); *Farrow v Orttewell* [1933] 1 Ch 480 (tenant vacated premises on assumption that notice to quit was valid and tenancy had come to an end); *Rodenhurst Estates Ltd v WH Barnes Ltd* [1936] 2 All ER 3 (landlord refrained from ejecting occupier on assumption that occupier was in possession as assignee of lessee); *Mooregate Mercantile Co Ltd v Twitchings* [1976] QB 225 (representee induced to assume that representor had no interest in vehicle purchased from third party; overturned on appeal on grounds not relevant to present discussion: [1977] AC 890); *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600 (representee purchased representor's vehicle on the assumption that it was owned by a third party).

[133] [1976] QB 225, 242.

is in the long line of cases in which it has been used as a defence to claims for moneys had and received.[134] The relevant assumption in each of those cases could be regarded as an assumption as to rights: that the moneys in question belonged to the recipient, or that the recipient was legally entitled to the moneys paid. The cases could almost have been dealt with under the doctrine of proprietary estoppel, on the basis that the recipient incurred expenditure on the faith of an assumption of rights in the money being paid.[135] The payer's representation that the recipient was entitled to the money paid has, however, consistently been treated as a representation of fact and the common law principle of estoppel applied as a complete defence to the payer's claim for repayment.

Another prominent case in which an assumption of rights was treated as an assumption of fact was *Texas Bank*, the facts of which were discussed above.[136] The trial judge, Robert Goff J, applied the principles of equitable estoppel, on the basis that the relevant assumption adopted by the bank was that the guarantee given by the plaintiffs constituted a binding and effective guarantee covering the relevant loan.[137] This could clearly be characterised as an assumption as to the bank's rights.[138] Since the guarantee in *Texas Bank* was secured on real property, the relevant assumption could even be construed as an assumption as to the bank's proprietary rights. As discussed above, however, two members of the Court of Appeal applied the common law principle of estoppel by convention, on the basis that the parties had contracted on the basis of an assumed state of

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[134] *Skyring v Greenwood* (1825) 4 B & C 281; 107 ER 1064; *Shaw v Picton* (1825) 4 B & C 715; 107 ER 1226; *Cave v Mills* (1862) 7 H & N 913; 158 ER 740; *Deutche Bank (London Agency) v Beriro & Co* (1895) 73 LT 669; *Holt v Markham* [1923] 1 KB 504; *Avon County Council v Howlett* [1983] 1 All ER 1073.

[135] Spencer Bower and Turner, above n 4, 295 in fact treat these cases as instances of estoppel by acquiescence or encouragement which, they suggest, 'is as applicable to transactions with respect to money as it is to transactions with respect to land.'

[136] Above nn 26-32 and accompanying text.

[137] [1982] 1 QB 84, 107.

[138] In *Norwegian American Cruises A/S v Paul Mundy Ltd (The "Visafjord")* [1988] 2 Lloyd's Rep 343, 351 Bingham LJ acknowledged that the relevant assumption in *Texas Bank* was an assumption as to the effect of the guarantee. This, he said, exemplifies the principle that the agreed assumption required to establish an estoppel by convention 'need not be one of fact, but may be one of law.'

affairs.[139] The relevant assumption was held to be one of existing fact: that the plaintiffs had guaranteed the loan in question.[140]

The cases discussed above demonstrate the great difficulty, if not impossibility, of distinguishing clearly between assumptions of fact and assumptions of rights. An assumption of rights can be regarded as an assumption of existing fact because the existence of rights is itself a fact.[141] It was the artificiality of drawing this type of distinction that led the High Court to abandon the distinction between mistakes of fact and mistakes of law in the law of restitution.[142] It is equally clear that the distinction between assumptions of existing fact and assumptions as to existing rights cannot be maintained in circumstances in which the characterisation of the assumption could potentially lead to great differences in the result of a case, as the above discussion of *Avon County Council v Howlett* illustrated.[143] It may be possible to resolve this problem by drawing a clearer line between facts and rights, but it is far from clear that it would be possible to devise an effective formula for making such a distinction.[144] It would, therefore, be preferable to recognise the existence of a doctrine of estoppel in which the

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[139] Lord Denning MR, ibid 121-2, applied a 'general principle [of estoppel] shorn of limitations'. He held the relevant assumption to be an assumption as to the meaning or effect of the contract.

[140] Ibid 126 (Eveleigh LJ), 131 (Brandon LJ).

[141] J Unger, 'The High Trees Case: Promise or Gift' (1965) 28 *Modern Law Review* 231, 233-5 has argued that the difficulties inherent in promissory estoppel can be avoided in cases where contractual rights have been waived, because it is possible to construe the relevant 'promise' as a representation as to the rights of the parties, which is a representation of existing fact. An example of such a construction is provided by *Craine v Colonial Mutual Fire Assurance Company Ltd* (1920) 28 CLR 305. The High Court held in that case that a representation by an insurer that the insured's rights under an insurance policy were unimpaired by his failure to comply with the terms of the policy was a representation of fact sufficient to establish an estoppel at common law.

[142] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, esp at 374 where Mason CJ and Deane, Toohey, Gaudron and McHugh JJ referred to the 'artificiality' as well as the 'difficulty and illogicality of seeking to draw a rigid distinction between cases of mistake of law and mistake of fact.'

[143] Above text accompanying nn 117-122. If a similar situation arose in Australia today, then the characterisation of the representee's assumption would be of great significance. If it were characterised as an assumption of existing fact, then common law estoppel would apply, preventing any action by the representor. If, on the other hand, it were characterised as an assumption as to rights, then equitable estoppel should be applied, the effect of which would be limited to preventing or reversing the detriment suffered by the representee as a result of his or her reliance.

[144] The difficulty of devising such a formula has been observed by Bennett, above n 23, 550.

remedial consequences of estoppels arising from assumptions of fact are the same as those arising from assumptions as to rights.

(c) Does equitable estoppel itself provide a cause of action?

The notion that equitable estoppel is itself a source of legal obligation, and provides an independent cause of action, is central to this thesis.[145] Such a view of equitable estoppel is not, however, universally accepted. The alternative view is that equitable estoppel operates in the same way as common law estoppel, simply to establish a state of affairs by reference to which the rights of the parties are then established. There are three reasons why such a view is not tenable. First, the flexibility exercised by courts of equity in the granting of relief in estoppel cases is only possible if the estoppel is itself a source of legal obligation. Secondly, an estoppel which operates in relation to assumptions as to future conduct logically must operate as a source of rights. Thirdly, there have been many cases in which estoppel has been successfully relied upon in which no other cause of action was available; in such cases the estoppel must itself have provided the grounds for relief.[146]

The notion that equitable estoppel is not a cause of action is articulated most clearly in the judgment of Deane J in *Verwayen*. Deane J remarked that the principle of estoppel by conduct 'does not of itself constitute an independent cause of action.'[147] Rather, the effect of an estoppel, both at common law and in equity,[148] is to preclude denial of an assumed state of affairs by reference to

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[145] This view was supported by statements of principle in *Verwayen* (1990) 170 CLR 394, 430 (Brennan J: 'in strict theory, a party who is entitled to equitable relief to make good some detriment suffered in reliance on a promise has a cause of action'), 500 (McHugh J: 'the equitable doctrines of estoppel create rights. They give rise to equities which are enforceable against the party estopped.')

[146] It should also be noted that in *News Corporation Ltd v Lenfest Communications Inc* (Supreme Court of New South Wales, Giles J, 20 September 1996), Giles J held that, for the purpose of determining whether the plaintiff's cause of action arose within the state (so as to enable originating process to be served outside the jurisdiction), it was strongly arguable that a claim in the nature of an equitable estoppel claim was a cause of action.

[147] (1990) 170 CLR 394, 445.

[148] In *Waltons Stores* (1988) 164 CLR 387, 451-2, Deane J held that the principle of estoppel by conduct applies uniformly at common law and in equity to assumptions of existing fact. That principle was extended in *Foran v Wight* (1989) 168 CLR 387, 435, when Deane J recognised

which the rights of the parties are determined.[149] Although Deane J was applying a unified principle of estoppel in *Verwayen*, it is clear from earlier judgments that he regarded equitable estoppel as having a similar preclusionary operation.[150]

Although Deane J has been alone in recent High Court decisions in his adoption of the view that equitable estoppel is not itself a source of substantive rights, the view finds support in other quarters. It reflects Lord Denning's conception of promissory estoppel as a principle that did not create new causes of action, but only prevented a party from insisting upon his or her strict legal rights in situations where it would be unjust to allow them to be enforced.[151] Justice Gleeson echoed Justice Deane's view of equitable estoppel in a recent paper, and in fact took it to be the prevailing view. In summarising the direction in which the High Court is moving in relation to promissory estoppel, he said that: 'An estoppel may be used defensively or aggressively, in aid of a cause of action; but it cannot on its own constitute a cause of action.'[152]

The first problem with the notion that equitable estoppel does not create a cause of action is that it is inconsistent with even Justice Deane's own limited approach to the question of remedy.[153] Deane J has said that, *prima facie*, the operation of an estoppel by conduct is to preclude departure from the assumed state of affairs.[154] That *prima facie* entitlement must be qualified, however, if such relief would 'be inequitably harsh'[155] or 'would exceed what could be justified by the requirements of good conscience and would be unjust to the estopped party.'[156] In those cases some lesser form of relief should be awarded.[157] In some cases, Deane J suggested, 'the appropriate order may be an order for compensatory

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that *Jorden v Money* should no longer be regarded as good law, and the principle should be regarded as applicable to assumptions relating to the future conduct of the representor.

[149] (1990) 170 CLR 394, 445.

[150] *Waltons Stores* (1988) 164 CLR 387, 450; *Foran v Wight* (1989) 168 CLR 385, 435.

[151] See, eg: *Combe v Combe* [1951] 2 KB 215, 219.

[152] AM Gleeson, 'Innovations in Contract: An Australian Analysis' in PBH Birks (ed), *The Frontiers of Liability* (1994), vol 2, 113, 119.

[153] As will be seen in Chapter 7, other members of the court adopted an approach to remedy which indicates even more clearly the substantive nature of equitable estoppel.

[154] (1990) 170 CLR 394, 442, 443, 445-6.

[155] Ibid 443.

[156] Ibid 445-6.

[157] Ibid 443.

damages.'[158] It is not at all clear from Justice Deane's judgment in *Verwayen*, however, how a 'remedy' can be granted where there is no cause of action. It is particularly difficult to identify a basis on which a court could make an order for the payment of compensatory damages. Deane J appeared to appreciate the difficulty when, after referring to the notion that in some cases 'equitable relief may be available only on a more restricted basis', he insisted that 'the point remains that promissory estoppel does not *of itself* give rise to any entitlement to relief in equity.'[159]

This problem of remedy reveals the illogicality of applying the principles of the preclusionary common law doctrine of estoppel to a representation relating to the representor's future conduct, which was observed by Gaudron J in *Waltons Stores*:

> It is clear from *Jorden v Money* and the many cases in which it has been applied that a representation as to future conduct will not found a common law or evidentiary estoppel. That it will not found a common law or evidentiary estoppel is not merely a matter of authority, but also a matter of logic - at least in so far as the representation gives rise to an assumption as to a future event. Because common law or evidentiary estoppel operates by precluding the assertion of facts inconsistent with the assumed fact, the assumption must necessarily be as to an existing fact and not to a future event.[160]

Accordingly, it is clear that a doctrine of estoppel which operates in relation to the future conduct of one of the parties logically must be regarded as creating substantive rights.

The third problem faced by proponents of Justice Deane's approach is that there have been many cases in which equitable estoppel has been applied in which the

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[158] Ibid 442.
[159] Ibid 437.
[160] (1988) 164 CLR 387, 459.

estoppel must itself have provided the cause of action, because no other cause of action was available on the facts. The leading examples of such cases are the proprietary estoppel cases, in which plaintiffs were able to claim interests in land solely on the basis that they had relied on an assumption, induced by the conduct of the defendant, that they had been, or would be, given an interest in the subject land.[161] The decision of the English Court of Appeal in *Western Fish Products Ltd v Penwith DC*[162] appeared to be based in part on the principle that estoppel could only operate as a cause of action in relation to rights and interests in or over land and possibly other forms of property. The decisions of the High Court in *Waltons Stores* and *Verwayen*, however, remove any doctrinal distinction between promissory and proprietary estoppel in Australia. One result of that doctrinal unity is that equitable estoppel must be able to be used as a cause of action outside the proprietary estoppel context, and, indeed, subsequent cases show that equitable estoppel has not been so limited since those High Court decisions. A striking example is the recent case of *W v G*,[163] in which Hodgson J granted relief on the basis of equitable estoppel where it was clear that no other cause of action was available.

The facts of *W v G* were as follows. The plaintiff and the defendant lived together in a lesbian relationship for more than eight years. Some years into the relationship, the plaintiff told the defendant that she wished to have children. The defendant assisted the plaintiff in a course of artificial insemination, as a result of which the plaintiff ultimately bore two children. Hodgson J found that the

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[161] Examples of prominent proprietary estoppel cases in which the estoppel itself must be regarded as the cause of action include: *Dillwyn v Llewelyn* (1862) 4 De GF & J 517; 45 ER 1285; *Plimmer v Wellington Corp* (1884) 9 App Cas 699; *Crabb v Arun District Council* [1976] Ch 179; *Greasley v Cook* [1980] 1 WLR 1306; *Re Basham* [1986] 1 WLR 1498; *Jackon v Crosby (No 2)* (1979) 21 SASR 280; *Riches v Hogben* [1986] 1 Qd R 315. Spencer Bower and Turner, above n 4, 303-6 argued that *Plimmer v Wellington Corp* could be explained as decided on an implied contract, and *Dillwyn v Llewelyn* as founded on an equity giving rise to a trust. They conceded, however, that the facts giving rise to an estoppel by acquiescence establish a cause of action without more, and in this respect estoppel by acquiescence differs from other estoppels.

[162] [1981] 2 All ER 204.

[163] (1996) 20 Fam LR 49. Another example is *Lee Gleeson Pty Ltd v Sterling Estates Pty Ltd* (1991) 23 NSWLR 571, where a builder completed certain building works for a property owner in financial difficulties on the faith of a representation that the builder would be paid by the owner's bank from the sale proceeds of the property. Brownie J held that an equitable estoppel arose against the bank in those circumstances, which prevented the bank from denying the

defendant created or encouraged in the plaintiff an assumption that 'the defendant would act with the plaintiff as parents of the two children, and would assist and contribute to the raising of these children for so long as was necessary.'[164] He held that the plaintiff relied on that assumption in deciding to have each of the children, and that the defendant knew or intended that the plaintiff would do so. Accordingly, Hodgson J held that the plaintiff was entitled to relief on the basis of equitable estoppel.[165]

The case of *W v G* affords an instance of the granting of relief on the basis of equitable estoppel, outside the proprietary estoppel context, where it was clear that no cause of action was available to the plaintiff other than the estoppel itself. Hodgson J noted that counsel for the defendant relied on 'obiter comments by Deane J in *Commonwealth v Verwayen* ... to the effect that estoppel may be used as a sword only where the claim is based on an independent cause of action arising under ordinary principles of law.'[166] Hodgson J did not explain why he was prepared to disregard those comments, but clearly did not see them as representing the law, since he granted relief to the plaintiff where no other cause of action arose.

3. Equitable Estoppel and Contract Law

A final aspect of equitable estoppel which must be mentioned by way of introduction is the relationship of the doctrine to contract law. Equitable estoppel can be said to be closely analogous to contract law in those cases where the estoppel gives legal force to a promise: the promisee's reliance on the promise can be seen as providing a substitute for the valuable consideration required to give rise to contractual obligations. That is particularly so when, as is very often the case, the effect of the estoppel is that the promisor is made to

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existence or the binding quality of its representation to the builder.

[164] (1996) 20 Fam LR 49, 66.

[165] The actual relief granted was an order that the defendant to pay the sum of $151,125 into an interest bearing account, which was then to be used to buy annuities for each child providing monthly payments until the child reached 18.

[166] (1996) 20 Fam LR 49, 66.

fulfil the promise.[167] It is therefore, necessary to consider the doctrinal basis of the equitable estoppel cases, and the extent to which those cases can be distinguished from contracts enforced on the basis of valuable consideration.

Paul Finn has examined in some detail the doctrinal basis of equity's jurisdiction to make good representations.[168] His analysis of the cases shows that the basis of the jurisdiction was quite unclear in the mid nineteenth century and, indeed, the adoption of the language of contract in many of the cases reveals considerable uncertainty in the minds of some of the judges as to the relationship of equitable principle to that of the common law.[169] A good example of that confusion is the Lord Chancellor's finding in *Dillwyn v Llewelyn* that, although the original promise was a gift, the promisee's expenditure on the faith of it 'supplied a valuable consideration and created a binding obligation.'[170] The basis of the jurisdiction remained unresolved at the beginning of this century in New South Wales. In *Hamilton v Geraghty*,[171] Owen J observed that the interest in land which arose where the owner stood by while another mistakenly improved the land was 'created either by contract or by estoppel.'[172] Similarly, in 1931, the Privy Council suggested that the foundation of equity's intervention in proprietary estoppel cases was 'either contract or the existence of some fact which the legal owner is estopped from denying.'[173]

Confusion as to the boundary between proprietary estoppel and contract appears to have existed as recently as 1985 when, in *Beaton v McDivitt*,[174] Young J found that the parties had entered into a '*Dillwyn v Llewelyn* type contract.'[175] The case was concerned with an unusual arrangement. The defendants expected their land to be rezoned in a way that would greatly

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[167] See below Chapter 7.
[168] Finn, above n 83, 62-71.
[169] Ibid 63-4.
[170] (1862) 4 De GF & J 517; 45 ER 1285, 1287.
[171] (1901) 1 SR (NSW) (Eq) 81.
[172] Ibid 89.
[173] *Canadian Pacific Railway Co v The King* [1931] AC 414, 429.
[174] (1985) 13 NSWLR 134.
[175] Ibid 152.

increase the rates payable by them. Accordingly, they proposed to the plaintiff that, if he would work part of their land, they would transfer that part to him when the land was rezoned and subdivided. The plaintiff took possession of the land and worked it for some years, but neither the rezoning nor the transfer eventuated.

On those facts, Young J found that the plaintiff had provided no consideration in the form required by the High Court in *Australian Woollen Mills Pty Ltd v The Commonwealth.*[176] That is, there was no detriment suffered by the plaintiff, nor benefit conferred on the defendant, which could properly be regarded as the agreed price of the promise. The required relation of *quid pro quo* between the plaintiff's acts and the promise did not exist. Nevertheless, Young J considered that the line of cases which have followed *Dillwyn v Llewelyn* represented 'an exception to the modern requirement that a contract should be a bargain supported by consideration in the nature of a quid pro quo.'[177] On that basis, the plaintiff's reliance on the promise to his detriment provided *ex facto* consideration for the promise and gave rise to a contract between the parties.[178]

On appeal from the decision of Young J, a majority of the Court of Appeal refused to extend the bargain theory of consideration laid down by the High Court.[179] Kirby P rejected the attempt to establish, on the basis of *Dillwyn v Llewelyn*, an exception to the bargain concept of consideration as 'unconceptual and unhistorical.'[180] Close analysis of the judgment in *Dillwyn v Llewelyn*, as Kirby P pointed out, suggests that the basis of the decision was

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[176] (1954) 92 CLR 424, 456-7 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ). The doctrine of consideration laid down by the High Court in that case is virtually indistinguishable from the 'bargain theory' of consideration applied in the United States. Section 75(1) of the Restatement of Contracts (2d) suggests that the US courts require consideration in the form of something 'bargained for and given in exchange for the promise' in order to establish a contract.

[177] *Beaton v McDivitt* (1987) 13 NSWLR 162, 170 (Kirby P in the Court of Appeal).

[178] (1985) 13 NSWLR 134, 152.

[179] (1987) 13 NSWLR 162, 170 (Kirby P), 182 (McHugh JA). In *Waltons Stores* (1988) 164 CLR 387, 402, Mason CJ and Wilson J appeared to give their approval to a strict interpretation of the *Australian Woollen Mills* decision when they suggested that it 'may be doubted whether our conception of consideration is substantially broader than the bargain theory' developed in the United States. It should be noted that two members of the Court of Appeal in *Beaton v McDivitt* did find that the consideration requirement was satisfied on the facts: (1987) 13 NSWLR 162, 175 (Mahoney JA), 183 (McHugh JA). *Contra* Kirby P, ibid 169.

proprietary estoppel, rather than contract.[181] The approach taken by the Court of Appeal, therefore, clearly delineates the boundary between contract and equitable estoppel. A strict application of the bargain theory of consideration leaves equitable estoppel with exclusive application to gratuitous promises which have been relied upon to the promisee's detriment.[182]

C. *Unified Estoppels*

A significant feature of the recent High Court decisions on estoppel by conduct has been the recognition by members of the High Court of a unification of the common law and equitable doctrines of estoppel by conduct.[183] Deane J in *Waltons Stores*,[184] *Foran v Wight*[185] and *Verwayen*,[186] and Mason CJ in *Verwayen*,[187] recognised and applied unified principles of estoppel by conduct operating both at common law and in equity. Although Mason CJ and Deane J both recognised the unification of common law and equitable principles of estoppel by conduct, the unified principles they applied were fundamentally different. The unified doctrine recognised by Deane J was based on common law

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[180] Ibid 170.

[181] Similarly, McHugh JA, ibid 182, held that '[t]he jurisprudential basis of cases such as *Dillwyn v Llewelyn*, in my opinion, is that Equity will not allow a person to insist upon his strict rights when it is unconscionable to do so'. *Contra* PS Atiyah, 'Consideration: A Restatement' in *Essays on Contract* (1986) 179, 211-2; cf DE Allan, 'An Equity to Perfect a Gift' (1963) 79 *Law Quarterly Review* 238, 243-6.

[182] In *Waltons Stores* (1988) 164 CLR 387, 403, Mason CJ and Wilson J suggested that 'there is an obvious interrelationship between the doctrines of consideration and promissory estoppel, promissory estoppel tending to occupy ground left vacant due to the constraints affecting consideration.' See also AS Burrows, Contract, Tort and Restitution - A Satisfactory Division or Not?' (1983) 99 *Law Quarterly Review* 217, 241.

[183] The unification of the common law and equitable doctrines is clearly premised on the notion that it is appropriate for equity and the common law to constitute a single body of law, and represents a conscious attempt to allow the two bodies of principle to converge where appropriate, see: Sir Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238; Sir Anthony Mason, 'Equity's Role in the Twentieth Century' (1997-8) *King's College Law Journal* 1. It thus seems quite clear, as the Victorian Court of Appeal indicated in *Riseda Nominees Pty Ltd v St Vincent's Hospital (Melbourne) Ltd* (Victorian Court of Appeal, Brooking, Callaway and Kenny JJA, 12 September 1997), that a unified doctrine can be achieved only by embracing a substantive fusion of law and equity of the type which Meagher, Gummow and Lehane, above n 25, 37-59, have famously dedicated themselves to exposing and rooting out in the interests of doctrinal purity.

[184] (1988) 164 CLR 387, 451.

[185] (1989) 168 CLR 385, 435.

[186] (1990) 170 CLR 394, 440.

[187] Ibid 413.

estoppel, and essentially extended the application of common law estoppel to assumptions relating to the future conduct of the representor. The unified doctrine recognised by Mason CJ, on the other hand, was based on the modern doctrine of equitable estoppel, and essentially involved the application of that doctrine to assumptions of existing fact.

A defining feature of the unified doctrine of estoppel by conduct recognised by Deane J was, as already noted, that it did not provide an independent cause of action. Such an approach to the unified doctrine flowed naturally from Justice Deane's view that equitable estoppel, like common law estoppel, operated to establish a state of affairs by reference to which the rights of the parties were determined. Justice Deane's unified doctrine is a broad doctrine of general application which operates where a representee has adopted an assumption of 'fact or law, present or future', and has acted on the basis of the assumption so that he or she will be in a position of significant disadvantage if departure from the assumption is permitted.[188] The estoppel will arise against a person who has played such a part in the adoption of, or persistence of, the assumption, that it would be unconscionable to depart from it. The *prima facie* operation of the estoppel is to 'fashion an assumed state of affairs' by reference to which the rights of the parties are determined.[189] As in the case of common law estoppel, that state of affairs may be relied on defensively, or aggressively, as the factual foundation of a cause of action arising under ordinary principles.[190]

The prima facie entitlement to relief based on the assumed state of affairs will, Deane J said, be 'qualified' where such relief would 'exceed what could be justified by the requirements of good conscience and would be unjust to the estopped party.'[191] In such cases, the court must frame relief 'appropriate to do justice between the parties'.[192] As observed above in connection with equitable estoppel, however, there is a conceptual difficulty in recognising that relief based

[188] Ibid 444-5.
[189] Ibid 445.
[190] Ibid 444-5.
[191] Ibid 445-6.
[192] Ibid 446.

on the assumed state of affairs can be 'qualified', and some other relief substituted, where the estoppel itself does not constitute a cause of action. If estoppel by conduct does not itself provide a cause of action, but simply establishes the factual framework of an independent cause of action or defence, then it is difficult to see how the estoppel could govern the remedy granted to give effect to that cause of action or defence. There is also, as noted in the discussion of equitable estoppel above, a conceptual difficulty in applying a preclusionary doctrine to assumptions relating to the future conduct of the representor.[193]

The unified doctrine recognised by Mason CJ in *Verwayen* could be raised in similar circumstances, but operated rather differently. That 'one doctrine of estoppel' operates where a representor has induced a representee to hold 'an assumption as to a present, past or future state of affairs (including a legal state of affairs)'.[194] The estoppel arises where the representee has relied on that assumption, and allows a court of common law or equity to 'do what is required, but not more,' to prevent the representee from suffering detriment in reliance on the assumption as a result of the denial of its correctness.[195] The effect of the estoppel, then, is essentially the same as the doctrine of equitable estoppel: the estoppel raises an 'equity' in favour of the representee, which the court must satisfy by means of relief which does no more than prevent or reverse detriment resulting from the representee's reliance.[196] The only differences between the unified doctrine recognised by Mason CJ and the equitable doctrine are: first, that the unified doctrine operates both at common law and in equity; and, secondly, that the unified doctrine clearly applies to assumptions of existing fact, as well as assumptions as to the legal rights of the parties and the future conduct of the representor.

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[193] It should be noted that, although Deane J said that estoppel by conduct does not itself constitute a cause of action, he did acknowledge, ibid 444, that it was 'a doctrine of substantive law' which could be 'the origin of primary rights of property and of contract.' It is difficult to see how a doctrine of substantive law, which is the origin of primary rights, can fall short of providing a cause of action.

[194] Ibid 413.

[195] Ibid.

It is clear from the above discussion that it is not strictly accurate to speak of a single unified doctrine, since two quite different doctrines have been proposed by Deane J and Mason CJ. The view that the doctrines of estoppel by conduct should be treated as unified in any form has not yet been accepted by a majority of the High Court.[197] Three members of the High Court in *Verwayen* proceeded on the basis that common law and equitable estoppel remained separate doctrines,[198] while at most three members of the court accepted the unification of those doctrines.[199] Accordingly, this thesis will deal with the common law and equitable doctrines of estoppel by conduct as separate doctrines, and will also consider, where appropriate, the unified doctrines of estoppel by conduct applied by Mason CJ and Deane J.[200]

II. THE FOCUS OF THE THESIS

Although this thesis is concerned with the philosophy of estoppel by conduct both at common law and in equity, the analysis will concentrate on equitable estoppel and the unified doctrines which have been proposed. There are several reasons why the questions of philosophy or guiding motive under consideration are more important issues in relation to equitable and unified estoppels. The principal reason is scope of application. Common law estoppel does not apply to assumptions relating to the future conduct of the representor, and operates in a limited way, by preventing the representor from denying the existence of facts or rights.

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[196] *Waltons Stores* (1988) 164 CLR 387, 432-3 (Brennan J).

[197] See, eg: *Lorimer v State Bank of New South Wales* (New South Wales Court of Appeal, Kirby P, Priestley JA and Handley JA, 5 July 1991) , where Kirby P observed that since 'no clear majority has yet emerged in the High Court for a unified doctrine of estoppel and no holding of that Court so requires, this Court should for the moment observe the established distinction between common law estoppel in pais and equitable estoppel'.

[198] (1990) 170 CLR 394, 428-9 (Brennan J), 453-4 (Dawson J), 500-1 (McHugh J).

[199] Gaudron J may also have accepted the existence of a unified doctrine of estoppel. In *obiter* remarks, ibid 487, she noted her agreement with Mason CJ 'that *the substantive doctrine of estoppel* permits a court to do what is required to avoid detriment and does not, in every case, require the making good of the assumption' (emphasis added).

[200] The significant differences between the two unified doctrines proposed require them to be considered separately, particularly in relation to the question of remedy in Chapter 7.

Equitable estoppel and unified estoppels, on the other hand, can apply to assumptions relating to the future conduct of the representor. As a consequence, they do not simply establish a legal or factual state of affairs,[201] but operate to create independent substantive rights. As substantive doctrines, the equitable and unified doctrines are of considerably more theoretical interest, because the remedial effect of the doctrines is an open question. The courts must therefore consider the most appropriate way in which to give effect to the doctrines. The theoretical interest of equitable and unified estoppels is enhanced by the fact that they can, and often do, have the effect of enforcing promises. Difficult questions therefore arise as to their place within the law of obligations, and their relationship to the law of contract.

A second reason for the greater importance of philosophical questions in equitable estoppel is that estoppel in equity is currently in the process of transformation from a number of principles of limited application to a broad, substantive doctrine which is capable of providing remedies in an extremely wide range of situations. As this thesis will show, that process of transformation is not complete: there remain several important aspects of the doctrine which remain unresolved. The principles of common law estoppel, on the other hand, have been quite stable for some years, save for the question whether the common law doctrine should be unified with its equitable counterpart.

Although the theoretical questions are of greater significance in relation to the equitable doctrine, a consideration of the philosophy of estoppel by conduct must take common law estoppel into account. That is because close analysis of the cases reveals fundamental similarities between common law and equitable estoppel, and a number of important areas in which the principles of common law estoppel have influenced the development of the equitable doctrine. An important theme in this thesis is the commonality of purpose between equitable and common law estoppel. That commonality of purpose provides both a rationale for unification of the two sets of principles, as well as a basis for resolving the differences between them. It is under the banner of reliance that the two sets of

[201] Cf *Verwayen* (1990) 170 CLR 394, 445 (Deane J).

principles can best be brought together. The consideration in this thesis of the central questions of liability and remedy will show that the reliance-based philosophy of common law estoppel has been adopted and applied in the equity cases to give the equitable doctrines of proprietary and promissory estoppel a unity of purpose and of operation. The application of principles of common law estoppel in the equity cases shows that the integration of common law and equitable principle in these areas is already well advanced.

III. THE STRUCTURE OF THE THESIS

As noted above, the approach to be taken in this thesis is first to identify the philosophies by which the principles of estoppel by conduct can be argued to operate, and then to consider the extent to which those philosophies are manifested in the essential principles relating to liability and remedy. The three competing purposes or philosophies of estoppel will be examined in Chapter 2. The first of those philosophies is reliance theory, which is based on the notion that equitable estoppel is essentially concerned with protecting against harm resulting from reliance on the conduct of others. Reliance theory focuses on the position of the representee. The second theory to be examined is conscience theory, under which estoppels are seen as doctrines which operates, or should operate, primarily by reference to the notion of unconscionability. Conscience theory focuses on the knowledge and conduct of the representor. The third philosophy of estoppel to be examined is promise theory, under which estoppels are seen as doctrines essentially concerned with the enforcement of promises, which should be seen as, or adapted to become, part of the law of contract. Promise theory focuses on the nature of the representor's promise or commitment.

Chapters 3-7 will then examine in detail the essential principles by which the doctrines of estoppel by conduct operate. That examination will reveal tensions between the various philosophies in the way in which the doctrinal requirements are framed. In other words, it will show that there are various points in the determination of questions of liability and remedy at which a choice must be

made between the various philosophies. First, Chapter 3 will examine the threshold requirement which must be satisfied in order to make out an estoppel at common law or in equity. The threshold requirement essentially involves a choice between an 'induced assumption' and a particular type of conduct, such as a representation or a promise, as the basis of the estoppel.

The fourth chapter will examine the 'detrimental reliance' requirement: in other words, the requirement that the representee must act or refrain from acting on the basis of the assumption such that detriment will be suffered if the assumption is not adhered to. Chapter 5 will consider the 'reasonableness' requirement: the requirement that the representee must act reasonably in adopting and acting on the relevant assumption. That requirement will be contrasted with the requirement in the United States that the representor must reasonably expect reliance.

One of the important questions remaining unresolved in the wake of the recent High Court decisions on equitable estoppel is whether, in addition to the core elements outlined above (assumption, inducement and reasonable detrimental reliance), the representee must also show that it would, in the circumstances, be unconscionable for the representor to depart from the relevant assumption. The 'unconscionability' requirement will be examined in Chapter 6. As that chapter will show, the unconscionability question is essentially concerned with the representor's knowledge of the representee's detrimental reliance.

Having considered all of the fundamental questions relating to establishing an estoppel, the important question of remedy will then be addressed in Chapter 7. That examination will show that the question of remedy can be approached in accordance with any of the three contending philosophies outlined in Chapter 2: remedies can be determined on a reliance-basis, a conscience-basis or a promise basis. The choice between the three approaches is thus an important one for the philosophy of estoppel.

The analysis of questions of liability and remedy in Chapters 3-7 will then be drawn together in Chapter 8, which will highlight the conflicts between the various philosophies in the formulation of the doctrinal requirements. Chapter 8 will show that those conflicts have in most cases been resolved, and are best resolved, in favour of a reliance-based approach. Chapter 8 will show that, although there is some equivocation between the different philosophies of estoppel, reliance theory best characterises the approach taken by the courts. Accordingly, the principles of estoppel are best seen as part of the law of wrongs, creating a duty to ensure that others do not suffer harm as a result of reliance on one's conduct.

Chapter 2

THE COMPETING PHILOSOPHIES OF ESTOPPEL*

The aim of this chapter is to outline, for the purposes of the analysis to follow, the contending theories or philosophies which appear to underlie the principles of estoppel by conduct. The discussion is primarily concerned with the philosophies of the Australian doctrines of common law and equitable estoppel, and the unified doctrines which have been proposed. It will, however, draw on discussions of the doctrines of estoppel operating in England and the United States. Although there are important differences between these doctrines, many insights can be gained from a comparison of their respective philosophies and modes of operation. Because of the great differences between the various doctrines of estoppel operating in the common law world, it is also appropriate to consider in the abstract what the philosophy of *a* doctrine of estoppel might be: what purpose it might serve, and how it might be shaped to achieve that purpose.

The three contending philosophies of estoppel to be explored in this chapter are reliance theory, conscience theory and promise theory. Those theories can be viewed in a number of different ways. First, they can be seen as simply expressing coexisting and complementary purposes of estoppel. The three purposes of a doctrine of estoppel could be said to be: first, protecting representees against the detrimental consequences of reliance on the conduct of representors; secondly, preventing unconscionable conduct by representors; and, thirdly, enforcing certain promises and representations. A comprehensive view of the purpose of equitable estoppel in Australia, for example, is that the doctrine is designed to protect against harm resulting from reliance and to prevent unconscionable conduct by enforcing promises and making good representations which have been relied upon. With some exceptions and many differences in emphasis, it can be said that such a pluralistic view of the purpose of equitable estoppel has prevailed in the cases and commentary in Australia since the High

* Parts of this chapter have been published in 'Towards a Unifying Purpose for Estoppel' (1996) 22 *Monash University Law Review* 1-29 and 'Situating Equitable Estoppel Within the

Court's decision in *Waltons Stores (Interstate) Ltd v Maher.*[1] As the following three chapters will show, however, a pluralistic view of the purpose of a doctrine of estoppel is untenable. A doctrine cannot pursue all three purposes simultaneously because, as this thesis will show, there are several important points in the determination of liability and remedy at which the various purposes conflict.[2] Accordingly, a choice must be made between them, and one purpose emphasised at the expense of the others.

As Richard Wright has argued in relation to theories of tort law, a pluralistic theory suffers from a surfeit of reasons and norms.[3] The problem he identifies in a pluralistic approach to tort theory is that:

> when in a particular situation two or more of the pluralistic norms conflict - which will usually be the case - the theory will be normatively, descriptively and analytically arbitrary and indeterminate in terms of specifying which competing norm(s) should predominate, unless there is a some foundational norm that can resolve the conflict between the competing subnorms. Yet if such a foundational norm exists, the theory at its deepest level is monistic rather than pluralistic.[4]

That problem applies equally to a pluralistic theory of estoppel. There are several points at which one must choose between the reliance-based, conscience-based and promise-based philosophies.[5] Accordingly a 'monistic foundational theory'[6] must be developed to resolve the conflicts between the contending theories.

Law of Obligations' (1997) 19 *Sydney Law Review* 32-64.

[1] (1988) 164 CLR 387 ('*Waltons Stores*').

[2] The principal conflicts between the three philosophies lie in the areas of the threshold requirement (discussed in Chapter 3 below), the way in which reliance is tested (discussed in Chapter 4 below), the reasonableness requirement (discussed in Chapter 5 below), the role of unconscionability and the knowledge requirement (discussed in Chapter 6 below) and in the way in which relief is determined (discussed in Chapter 7 below).

[3] Richard Wright, 'Right, Justice and Tort Law' in David Owen (ed), *Philospophical Foundations of Tort Law* (1995) 159, 160.

[4] Ibid.

[5] Robert Hillman, *The Richness of Contract Law* (1997) 43-77 advocates a pluralistic theory of promissory estoppel in the United States on the basis that judges pay close attention to both promise and reliance and 'because the normative significance of both principles leave little reason to promote one and demote the other.' Hillman does not, however, address the crucial

The second way of looking at the contending theories of estoppel, then, is to see them as alternative philosophies. That approach will be taken in this chapter: the different purposes of estoppel will be presemted as separate theories, on the assumption that they are alternatives. That assumption will be justified in the chapters to follow, which will reveal the tensions between the different philosophies and will show why a doctrine of estoppel must favour one purpose over the others. Approaching the contending theories as alternatives has been more common in academic discussion of estoppel in England and the United States, where different writers have clearly supported reliance-based,[7] conscience-based[8] or promise-based[9] theories of estoppel, either expressly or implicitly disapproving of competing theories. Different commentators have, however, supported those theories in differemt ways. Some writers support a particular theory from a purposive point of view, suggesting that the theory expresses the essential or fundamental purpose of a doctrine of estoppel. Others support a theory from an analytical point of view, suggesting that a doctrine operates according to a particular theory, without necessarily suggesting that it should so operate. Others make a normative claim that a doctrine would operate best according to a particular theory. Most writers make some combination of purposive, analytical and normative claims.[10] This chapter is concerned to examine all three aspects of the theories of estoppel by conduct: purposive, analytical and normative.

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question of how to resolve the doctrinal conflicts that inevitably arise between the two norms.

[6] Wright, above n 3.

[7] Nicholas McBride, 'A Fifth Common Law Obligation'' (1994) 14 *Legal Studies* 35; Michael Metzger and Michael Phillips, 'The Emergence of Promissory Estoppel as an Independent Theory of Recovery' (1983) 35 *Rutgers Law Review* 472.

[8] Margaret Halliwell, 'Estoppel: Unconscionability as a Cause of Action' (1994) 14 *Legal Studies* 15.

[9] AS Burrows, 'Contract, Tort and Restitution - A Satisfactory Division or Not?' (1983) 99 *Law Quarterly Review* 217, 262; Randy Barnett, 'A Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269; Edward Yorio and Steve Thel, 'The Promissory Basis of Section 90' (1991) 101 *Yale Law Journal* 111; PS Atiyah, *An Introduction to the Law of Contract* (5th ed, 1995) 27-34; Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *University of Western Ausralia Law Review* 1, 63-4; Elizabeth Cooke, 'Estoppel and the Protection of Expectations' (1997) 17 *Legal Studies* 258.

[10] As Tom Campbell, 'Liberalism and the Law of Contract' in Alan Gamble (ed), *Obligations in Context* (1990) 111, 111 has noted in relation to theories of contract, the various theories of estoppel 'are regularly claimed to capture the essential logic of existing bodies of legal rules and principles as well as to point the way towards desirable developments... The attempt to combine explanatory and justificatory enterprises [makes] for serious equivocation between the "is" and the "ought" within the contending theories'.

This thesis leaves out of account two normative schools of thought which have been advanced in relation to promissory estoppel in the United States: relational contract theory and law and economic theory. Relational contract theory, founded on the work of Ian Macneil,[11] is based on the idea that contract law should be concerned with the relationships between parties dealing with one another, rather than assuming that all exchanges are discrete transactions. Jay Feinman has argued that a relational approach should replace both traditional contract doctrine and promissory estoppel in the United States.[12] A number of commentators in the United States have also argued that the doctrine of promissory estoppel should be reformed in the interests of economic efficiency.[13] On the assumption that the goal of the law is to promote economic efficiency, they have advocated new tests for determining liability and remedy in estoppel which will, they claim, encourage more efficient behaviour. Both of those approaches are strictly normative, rather than analytical: they propose radical change on the basis of a new normative framework, and do not assist in an understanding of how promissory estoppel operates. For that reason, they cannot logically be considered alongside reliance, conscience and promise-based theories, which principally seek to provide an understanding of how estoppels operate, and for the most part advocate change only in the form of a shift in emphasis. Accordingly, they will not be discussed further in this thesis.

I. RELIANCE THEORY

Reliance theory is based on the notion that the principal objective of estoppel by conduct is to protect representees from harm caused by reliance on the conduct of representors, when representors depart from the assumptions induced

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[11] Ian Macneil, 'Values in Contract: Internal and External' (1983) 78 *Northwestern University Law Review* 340.
[12] Jay Feinman, 'The Last Promissory Estoppel Article' (1992) 61 *Fordham Law Review* 303.
[13] Charles Goetz and Robert Scott, 'Enforcing Promises: An Examination of the Basis of Contract' (1980) 89 *Yale Law Journal* 1261; Daniel Farber and John Matheson, 'Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"' (1985) 52 *University of Chicago Law Review* 903; Avery Katz, 'When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations' (1996) 105 *Yale Law Journal* 1249.

by their conduct.[14] Support for this purpose of estoppel can be found in statements of several Australian judges and commentators, although it is important to note that, in the case of the equitable doctrine at least, such support is not generally exclusive of the other purposes discussed below. In Australia, protecting against the detrimental consequences of reliance is usually supported as *one* of the purposes of equitable estoppel, along with the prevention of unconscionable conduct. It is not generally presented as the fundamental purpose around which the doctrine is or should be organised, or as a foundational norm to which recourse can be had in the event of conflict between the various sub-norms operating in estoppel.

A. *Judicial Support*

The notion that the purpose of a principle of estoppel is to prevent harm resulting from reliance on the conduct of others has its origins in the common law, and has only recently been adopted in the equity cases. Extremely influential in this regard have been the judgments of Dixon J in *Thompson v Palmer*[15] and *Grundt v Great Boulder Pty Gold Mines Ltd*,[16] and particularly Justice Dixon's statement in the latter case that the 'basal purpose' of the doctrine of estoppel *in pais* 'is to avoid or prevent a detriment to the party asserting the estoppel'.[17] That statement has been invoked more recently by the High Court, not only as a 'classical statement' of the doctrine of estoppel *in pais*,[18] but as the basis of both the common law and equitable doctrines of estoppel.[19] Brennan J said in *Waltons Stores* that the basic object of equitable estoppel, like the object of estoppel *in pais*, was the avoidance of the detriment occasioned by the conduct of the party against whom the estoppel is raised.[20] Similarly, in *Commonwealth v Verwayen*,

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[14] This approach to promissory estoppel in the United States was described as 'reliance theory', and its adherents as 'reliance theorists' by Yorio and Thel, above n 9, esp at 112-5. A detailed analysis of the reliance theory of promissory estoppel in the United States is provided by Hillman, above n 5, 48-60.
[15] (1933) 49 CLR 507, 529-49.
[16] (1937) 59 CLR 641, 660-682.
[17] Ibid 674.
[18] *Legione v Hateley* (1983) 152 CLR 406, 430 (Mason and Deane JJ); *Waltons Stores* (1988) 164 CLR 387, 414 (Brennan J).
[19] *Commonwealth v Verwayen* (1990) 170 CLR 394, 501 (McHugh J).
[20] *Waltons Stores* (1988) 164 CLR 387, 421 & 423.

Mason CJ said that 'the fundamental purpose of all estoppels [is] to afford protection against the detriment which would flow from a party's change of position if the assumption that led to it were deserted'.[21] There is, therefore, strong judicial support for the proposition that the fundamental purpose of estoppel by conduct, both in equity and at common law, is to prevent a person from suffering detriment as a result of reliance on the conduct of another. As will be seen below, however, the object of preventing unconscionable conduct has received equally strong support from the same judges in relation to the equitable doctrine.

An important feature of reliance theory as the basis of a doctrine of estoppel is that it serves to distinguish that doctrine from the law of contract. In developing the principles of estoppel in Australia, the United States and in England, the courts have been careful to preserve the law of contract. The courts have sought to ensure that the recognition of reliance based doctrines of estoppel does not 'cut the doctrine of consideration up by the roots', as Holmes J famously warned in *Commonwealth v Scituate Savings Bank.*[22] A desire to preserve the law of contract is evident in the decision of the House of Lords in *Jorden v Money.*[23] Their Lordships' finding that an estoppel could not arise out of an expression of future intention, and must be based on a representation of existing fact, appears to have been based in large part on a desire to draw a clear distinction between the law of contract and the principle of estoppel. That influence is particularly evident in the judgment of the Lord Cranworth LC.[24]

A desire to protect the principles of contract law is also evident in the development of promissory estoppel. In formulating the nascent principle of promissory estoppel in *Combe v Combe*, Denning LJ observed that, since

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[21] (1990) 170 CLR 394, 410 (*'Verwayen'*).

[22] 137 Mass 301, 302 (1884), quoted in *Waltons Stores* (1988) 164 CLR 387, 400 (Mason CJ and Wilson J).

[23] (1854) 5 HLC 185; 10 ER 868.

[24] Ibid 882. Mark Lunney, 'Jorden v Money—A Time for Reappraisal?' (1994) 68 *Australian Law Journal* 559, 562, has also observed that Lord Cranworth's judgment is 'permeated by a desire to defend the principle that the right to rely on an expression of future intention could only be enforced through contract.' Similarly in *Maddison v Alderson* (1883) 8 App Cas 467, 473, Lord Selborne LC said: 'The doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro*, which, if binding at all, must be binding as contracts'.

promissory estoppel never stands alone as giving a cause of action in itself, the principle could never do away with the doctrine of consideration.[25] The doctrine of consideration was, he said, 'too firmly fixed to be overthrown by a side-wind', although principles such as promissory estoppel had largely mitigated its ill-effects of late.[26] When, in *Waltons Stores*, Mason CJ and Wilson J extended the principle of promissory estoppel to allow it to be used to enforce a gratuitous promise in the absence of a pre-existing legal relationship, they were mindful of the objection that the enforcement of such a promise might 'outflank the principles of the law of contract.'[27]

The perceived need to avoid encroachment into the territory of contract has, therefore, been an important influence on the development of both common law and equitable estoppel. One aspect of that influence in recent decisions of the High Court has been the emphasis which some judges have placed on the reliance basis of equitable estoppel, as a means of distinguishing the doctrine from contract.[28] The protection of reliance can be seen as a legitimate purpose for a doctrine of estoppel which operates in relation to promises, as equitable estoppel does in Australia, because protecting reliance is not usually seen as the primary purpose of contract.[29] Having the protection of reliance, through the avoidance of detriment, as the purpose of equitable estoppel legitimises that doctrine by distancing it from the enforcement of promises and the fulfilment of expectations, which can remain the exclusive province of the law of contract.[30]

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[25] [1951] 2 KB 215, 220.
[26] Ibid.
[27] (1988) 164 CLR 387, 400. Adam Duthie, 'Equitable Estoppel, Unconscionability and the Enforcement of Promises' (1988) 104 *Law Quarterly Review* 362, 366 has noted that the concern with avoiding harm has allowed the emergence of a doctrine of equitable estoppel which has been shorn of the limitation that the promise must relate to enforceable rights, but which is nevertheless compatible with the law of contract.
[28] See, for example, *Waltons Stores* (1988) 164 CLR 387, 423-4 (Brennan J); *Verwayen* (1990) 170 CLR 394, 455 (Dawson J).
[29] The notion that the enforcement of promises is the essential rationale of contract law will be discussed below under heading III. PROMISE THEORY.
[30] Thus, in *Waltons Stores* (1988) 164 CLR 387, 423, Brennan J said that if the object of avoiding detriment 'is kept steadily in mind, the concern that a general application of the principle of equitable estoppel would make non-contractual promises enforceable as contractual promises can be allayed.'

As well as differentiating equitable estoppel from the law of contract, reliance theory also allows equitable estoppel to be reconciled with the law of contract, so that the two bases of liability can comfortably exist side by side. Under reliance theory, contract and equitable estoppel can be seen as mirror images of one another in terms of their respective philosophies, modes of operation and effects. While contract is essentially concerned with the enforcement of promises, it will usually incidentally protect the promisee from harm resulting from reliance, and will occasionally operate only to prevent such harm, rather than enforcing the promise.[31] Similarly, while equitable estoppel is, according to reliance theory, essentially concerned with protecting reliance, it can often do so only by enforcing promises.[32] Protecting reliance is not the principal purpose of enforcing a contract, but is commonly an effect, and occasionally the only effect, of doing so; similarly, enforcing promises is not the purpose of equitable estoppel, but is a common by-product of its application. A reliance-based doctrine of promissory estoppel, therefore, sits comfortably alongside the law of contract and, importantly, does not do the same work as contract under a different name.[33]

B. *Academic Support*

While there is some support in the recent Australian commentary for the proposition that one of the purposes of equitable estoppel is to protect against the detrimental consequences of reliance,[34] commentators have given far greater emphasis to the purpose of preventing unconscionable conduct.[35] While reliance has tended to play a more subordinate role in the English courts than it has in the Australian courts, there is rather more support in the English commentary for reliance as the basis of equitable estoppel. Most famously, Patrick Atiyah has

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[31] See, eg, *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377; *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64.

[32] See Chapter 7 below.

[33] Paul Perell, *The Fusion of Law and Equity* (1990) 100, suggests that 'by limiting and defining the territory of operation of estoppel, the element of detriment may promote the peaceful co-existence of estoppel with the principle that, to be enforceable, promises should be supported by consideration.'

[34] JW Carter and DJ Harland, *Contract Law in Australia* (3rd ed, 1996) 132, for example, note that a 'significant feature' of estoppel is that it protects a person from the injurious consequences of reliance.

[35] See below, n 128 and accompanying text.

argued that both common law estoppel and promissory estoppel, 'no matter how they are conceptualized, provide many illustrations of what can only be rationally regarded as reliance-based liability.'[36] Hugh Collins has agreed that the English equitable estoppel cases can be seen to be based on a reliance model of contract, the purpose of which is to compensate for losses suffered as a result of 'misplaced reliance' on the conduct of others.[37] The notion of reliance can govern both liability and remedy under such a model. In the establishment of liability, the relevant harm is identified as detriment suffered as result of reliance on the words or conduct of the representor. In the determination of relief, the principal aim of such a model is restorative, to put the party who has suffered loss back in the position enjoyed prior to the acts of reliance.[38] Nicholas McBride has also argued that equitable estoppel is essentially concerned with protecting reliance.[39] McBride argues that the doctrines of equitable estoppel recognised in England and Australia, and the doctrine of promissory estoppel recognised in the United States, are manifestations of an 'as yet undefined' duty to prevent detrimental reliance on a promise.[40]

Protecting promisees against the consequences of their reliance on promises is also a popular justification for promissory estoppel in the United States under s 90 of the Restatement of Contracts (2d).[41] Indeed, it has been suggested that

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[36] PS Atiyah, 'Contracts, Promises and the Law of Obligations' in *Essays on Contract* (1986) 21.

[37] Hugh Collins, *The Law of Contract* (2nd ed, 1993) 84. Collins' characterisation of a successful representee's reliance as 'misplaced' is not entirely appropriate: the representee's reliance can be said to be misplaced in the sense that it has ultimately been disappointed, but it is clearly not misplaced if it is reasonable in the circumstances and will be legally protected. As Chapter 5 will show, reliance which is misplaced in the sense of being unreasonable will not be protected.

[38] Collins, ibid. Collins argues that the restorative theory of estoppel fails to account for the fact that the courts use the reliance theory of liability to enforce promises, and thereby put the person who has relied in a better position than he or she was originally. In other words, he suggests that reliance governs liability, but not remedy. This argument will be dealt with in Chapter 8.

[39] McBride, above n 7, 45-50.

[40] McBride's characterisation of the duty created by equitable estoppel will be discussed in Chapter 8.

[41] Section 90(1) provides that:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

'most commentators' in the United States 'hold that the objective of Section 90 is to protect promisees from loss caused by reliance on a promise'.[42] A reliance basis for promissory estoppel in the United States has been supported in a number of different ways. Warren Seavey characterises promissory estoppel as based on the wrong of inducing detrimental reliance. He suggests that '[t]he wrong is not primarily in depriving the plaintiff of the promised reward but in causing the plaintiff to change position to his detriment.'[43] Warren Shattock, on the other hand, supports reliance theory from a purposive point of view, suggesting that '[t]he reason for allowing the gratuitous promisee an action is his injury through reliance and not the promisor's act of promising.'[44] Similarly, promissory estoppel is characterised by Michael Metzger and Michael Phillips as an independent theory of recovery or cause of action, the essential purpose of which is to protect a promisee's reliance.[45]

It is important to note at this stage that support for reliance theory as the basis of promissory estoppel in the United States may be somewhat overstated. Three aspects of the doctrine articulated in s 90 cast doubt on the notion that the doctrine is organised primarily around the notion of reliance. First, the principle only operates where a representee relies on a promise, it does not create liability for simply causing another person to change his or her position to his or her detriment.[46] Secondly, the doctrine is also limited in its application to situations in which the promisor should reasonably expect detrimental reliance by the promisee.[47] Thirdly, the *prima facie* operation of the doctrine is to render the promise binding, rather than to relieve against the detrimental consequences of reliance.[48] It can, therefore, be said to be slightly artificial to focus on reliance

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[42] Yorio and Thel, above n 9, 112.
[43] Warren Seavey, 'Reliance on Gratuitous Promises and Other Conduct' (1951) 64 *Harvard Law Review* 913, 926.
[44] Warren Shattuck, 'Gratuitous Promisees - A New Writ?' (1937) 35 *Michigan Law Review* 908, 944.
[45] Metzger and Phillips, above n 7, 536-43.
[46] The distinction between the US threshold requirement of a 'promise' and the Australian threshold requirement of an 'induced assumption' will be discussed in Chapter 3.
[47] The distinction between the 'reasonable expectation of reliance' test under s 90 and the 'reasonableness of reliance' approach followed in Australia will be discussed in Chapter 5.
[48] The distinction between the promise-based approach to remedy adopted in the US and the Australian reliance-based approach will be discussed in Chapter 7.

as the basis of the United States doctrine. As with Australian estoppel, however, the question of philosophy is one of emphasis: one of the central questions to be addressed by this thesis is whether the various doctrinal rules relating to estoppel, when taken together, reveal a particular philosophical direction or fundamental purpose which the courts are pursuing.

C. *Reliance Theory in Practice*

As well as characterising the purpose of estoppel, reliance theory also characterises a mode by which a doctrine of estoppel can operate in order to fulfil that purpose. Logically, there should be a correlation between the purpose of a legal doctrine and the way in which it operates; otherwise the doctrine may not fulfil its purpose, may do so only obliquely, or may lack coherence. If the essential purpose of an estoppel is to prevent detriment being suffered by the representee as a result of his or her reliance on the representor's conduct, then that purpose can best be pursued if the doctrine is primarily concerned with the nature and circumstances of the representee's reliance. A reliance-based doctrine of estoppel would, therefore, operate primarily by reference to the concept of detrimental reliance, looking to the nature and circumstances of the representee's reliance, and the extent of detriment suffered as a result of that reliance, in order to determine questions of both liability and remedy.

Common law estoppel has operated for some time as a reliance-based doctrine. The notion that estoppel was primarily concerned with the position of the representee was pioneered by the Privy Council in *Sarat Chunder Dey v Gopal Chunder Laha*.[49] The Judicial Committee made it clear in that case that the determining element in the creation of an estoppel is the representee's reliance, and accordingly the court's focus is primarily on the position of the representee: 'What the law and the Indian Statute [adopting it] mainly regard is the position of the person who was induced to act'.[50] That focus on reliance was emphasised in the early decisions of the High Court of Australia on common law estoppel.

[49] (1892) LR 19 Ind App 203.
[50] Ibid 215.

Those cases did not require proof of wilful conduct on the part of the representor, nor did they require proof that the representor had knowledge of the representee's detrimental reliance. The reliance basis of common law estoppel was emphasised in the purpose of the doctrine and its operation, both of which focussed on the position of the representee, to the exclusion of the representor.[51] Dixon J in *Thompson v Palmer* held that '[t]he very foundation of the estoppel is the change of position to the prejudice of the party relying upon it.'[52] Similarly, in *Craine v Colonial Mutual Fire Insurance Co Ltd*, Isaacs J distinguished common law estoppel from waiver by means of the fact that estoppel 'looks chiefly at the situation of the person relying on the estoppel', with the consequence that 'the knowledge of the person sought to be estopped is immaterial.'[53]

Equitable estoppel, on the other hand, has not traditionally operated by reference to the representee's reliance, but has focussed instead on the intention, knowledge and conduct of the representor. That emphasis is attributable to the origins of equitable estoppel in equitable fraud, and the traditional role of the Court of Chancery as a court of conscience. The doctrinal manifestations of that orientation in the early cases will be examined in discussion of the unconscionability requirement in Chapter 6. It is, however, important to note here that the modern rationale of protecting against harm resulting from reliance clearly has its origin in the common law estoppel cases. That rationale has only been adopted comparatively recently in the equity cases in Australia, as a result of the influence of the judgments of Dixon J in *Thompson v Palmer*[54] and *Grundt v Great Boulder Pty Gold Mines Ltd*[55] on the Supreme Court of South Australia in *Je Maintiendrai Pty Ltd v Quaglia*,[56] and subsequently on the High Court in *Waltons Stores*[57] and *Verwayen*.[58]

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[51] *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674 (Dixon J): 'the basal purpose of the doctrine ... is to avoid or prevent a detriment to the party asserting the estoppel'.
[52] (1933) 49 CLR 507, 549.
[53] (1920) 28 CLR 305, 327.
[54] (1933) 49 CLR 507.
[55] (1937) 59 CLR 641.
[56] (1980) 26 SASR 101, especially at 106, where King CJ found that the basic principle underlying both common law estoppel *in pais* and promissory estoppel was the injustice of departing from a promise or representation which has been relied upon to the detriment of the representee.
[57] (1988) 164 CLR 387.

In those decisions, equitable estoppel has become more focussed on reliance in the determination of questions of both liability and remedy. The move towards a reliance basis for equitable estoppel brings equitable estoppel closer to common law estoppel in terms of both purpose and operation. The strengthening of the reliance framework of equitable estoppel can thus be seen as a unifying force, bringing the two sets of principles closer together, and perhaps facilitating their eventual merger. Those goals have repeatedly been articulated in the High Court.[59]

In any doctrine of estoppel, the focus on the representee's reliance cannot be exclusive. The nature of an estoppel 'by conduct' requires at least some threshold of conduct on the part of the representor, by which he or she is ultimately estopped. Using the language of tort law, neither common law nor equitable estoppel by conduct imposes strict liability. Both involve a notion of fault on the part of the representor, and that fault must flow from an act or omission of the representor. As the English Court of Appeal has said: 'All estoppels must involve some statement or conduct by the party alleged to be estopped on which the alleged representee was entitled to rely and did rely.'[60] Whether a doctrine of estoppel is plaintiff-focussed or defendant-focussed is, therefore, a question of degree. As the following five chapters will show, however, there are a number of crucial points in the determination of questions of liability and remedy which can be resolved either by reference to the representee or the representor, allowing considerable scope for a doctrine to operate essentially by reference to one party or the other.

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[58] (1990) 170 CLR 394.

[59] *Waltons Stores* (1988) 164 CLR 387, 447-53 (Deane J); *Foran v Wight* (1989) 168 CLR 385, 411 (Mason CJ), 435-6 (Deane J); *Verwayen* (1990) 170 CLR 394, 409-13 (Mason CJ), 440-5 (Deane J), 471 (Toohey J).

[60] *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte* [1985] 2 Lloyd's Rep 28, 34-5.

D. *Reliance Theory as a Tort Rationale*

At the basis of reliance theory are the related goals of providing protection against anticipated harm, and providing compensation for harm suffered. A reliance-based estoppel can be said to be based on a duty to prevent harm being suffered, as a result of reliance on one's conduct, when one departs from an assumption induced by that conduct. Estoppels enforce that duty in two different ways: in some cases by forcing the representor to act in accordance with the representee's expectations,[61] and in others by ordering the representor to repair or compensate a loss suffered by the representee as a result of his or her reliance on the representor's conduct.[62] Viewed in another way, a court can (*ex ante*) prevent the representor from committing an anticipated breach of duty or can (*ex post*) order the representor to correct or compensate a breach of duty. The two norms on which a reliance-based theory of estoppel is founded, protection against anticipated harm and compensation for harm suffered, could be said to be grounded in Aristotle's notion of corrective justice,[63] which recognises a duty to repair the wrongful losses for which one is responsible.[64] In the first case the representor's freedom of action is constrained in order to protect the representee from harm;[65] in the second, the representor is required to pay for the loss suffered by the representee as a result of the representor's breach of duty.

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[61] Common law estoppel by conduct invariably enforces the duty in this way, since the effect of an estoppel at common law is to hold the representor to the assumption the representee has been induced to adopt. Equitable estoppel also regularly enforces the duty in this way, as Chapter 7 will show, because in many cases the only way to prevent the representee from suffering harm as a result of reliance on the representor's conduct is to force the representor to act in accordance with the representee's expectations. See, eg: *Commonwealth v Clark* [1994] 2 VR 333, 381-5 (Ormiston J).

[62] The duty was enforced in this way in *The Public Trustee, as Administrator of the Estate of Percy Henry Williams (dec'd) v Wadley* (Full Court of the Supreme Court of Tasmania, Wright, Crawford and Zeeman JJ, 27 June 1997). The representee in that case performed certain services on the faith of her father's promise that he would leave his house to her on her death. When the father died intestate, the trustee of his estate was ordered to compensate or repair the loss suffered by the representee by payment of a sum of money.

[63] Outlined in *The Nicomachean Ethics*, Book V, Ch 4.

[64] Jules Coleman, 'The Practice of Corrective Justice' in David Owen (ed), *Philosophical Foundations of Tort Law* (1995) 53, 72.

[65] According to Wright, above n 3, protective justice is simply the *ex ante* preventive aspect of corrective justice.

It has been argued that the tort-like motive of providing protection against harm, and the tort-like remedy of compensating such harm, have no role to play in an equitable doctrine, since they are incompatible with the basis of the equitable jurisdiction in an unconscionable insistence on legal rights. Margaret Halliwell has argued that the function of proprietary estoppel is not to protect reliance, but to prevent injustice resulting from unconscionable conduct.[66] She relies on Lord Evershed's statement that proprietary estoppel has traditionally had a negative characteristic of restraining injustice, rather than doing justice; in other words stopping 'the unconscionable conduct of the person against whom equity proceeded.'[67] Lord Evershed argued that to succumb to the temptation of saying that 'equity is able to do justice where there is no justice before' is to venture into the dangerous territory of 'palm tree justice'.[68]

Prior to the High Court's decisions in *Waltons Stores* and *Verwayen*, Paul Finn also suggested that equitable estoppel was 'designed to prevent, within its own proper province, an unconscionable insistence upon strict legal rights.'[69] That observation was, Finn suggested, as much a statement of the limitations upon equity's powers as it was of the purpose of equitable intervention. Finn argued that the justification for continuing to confine equity to representations affecting rights was open to serious question,[70] and advocated the fusion of concepts from common law and equity which would give qualified enforcement to voluntary promises.[71] Giving equity the remedial capacity to make purely compensatory awards would free it from the 'strict rights' constraint on its jurisdiction and it would no longer need to be limited to operating on the rights of the representor.[72]

Two observations can be made in response to Halliwell's suggestion that the tort rationale of protecting against harm resulting from reliance is an inappropriate basis for equitable estoppel. The first is that it is not historically accurate to say

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[66] Halliwell, above n 8, 17.
[67] Raymond Evershed, 'Reflections on the Fusion of Law and Equity After 75 Years' (1954) 70 *Law Quarterly Review* 326, 329.
[68] Ibid.
[69] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (1985) 59, 93.
[70] PD Finn, 'Equity and Contract' in PD Finn (ed), *Essays on Contract* (1987) 104, 116.
[71] Ibid 119.

that estoppel has traditionally had an exclusively negative operation in equity. Secondly, to the extent that estoppel in equity has operated negatively, to prevent an unconscionable insistence on strict rights, it is clear that it is no longer restricted in that way in Australia. In its decision in *Waltons Stores*, the High Court clearly abandoned any notion that equitable estoppel was confined to preventing an unconscionable insistence on a representor's legal rights. Accordingly, a more fruitful question for present purposes is the extent to which the infiltration of reliance-based common law concepts into equitable estoppel have had the effect of bringing together common law and equitable principles in this area.

1. The Historical Argument

The notion of equity operating by reference to a tort rationale and providing compensation for a plaintiff's detrimental reliance on the conduct of another has considerable historical precedent. Three lines of cases can be cited to show that the Court of Chancery and other courts exercising equitable jurisdiction allowed tort-like actions for compensation for the detrimental consequences of reliance on the conduct of others, when those others departed from assumptions induced by their conduct. The first is the line of cases prior to 1500 identified by John Ames, the second is a line of nineteenth century cases concerned with making good representations, and the third is the line of cases known today as examples of proprietary estoppel. According to Ames, it was reasonably clear that equity gave relief before 1500 to a plaintiff who had incurred detriment on the faith of a defendant's promise.[73] The cases discussed by Ames in support of that claim indicate that tortious concepts and remedies were by no means foreign in early Chancery. The first is a case from 1378, which may well be the first recorded case of what is now equitable estoppel.[74] The plaintiff in that case incurred expenditure travelling to London to consult counsel in reliance on the defendant's

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[72] Ibid.

[73] JB Ames, 'The History of Assumpsit' (1888) 2 *Harvard Law Review* 1, 14-15, citing three cases, from the years 1378, 1438 and 1468, reported at: 2 Calendar of Proceedings in Chancery II; 1 Calendar of Proceedings in Chancery XLI; YB 8 Ed IV 4, pl ii.

[74] 2 Cal Ch II.

promise to convey land to the plaintiff. The plaintiff sought a subpoena to force the defendant to answer for his 'deceit' in breaching the promise. Not only was the action tortious in character, but the remedy must at that time have been compensation for the plaintiff's wasted expenditure:

> The bill sounds in tort rather than in contract, and inasmuch as even *cestuis que use* could not compel a conveyance by their feoffees to use at this time, its object was doubtless not specific performance, but reimbursement for the expenses incurred.[75]

The second case cited by Ames is the 1438 case of *Appilgarth v Sergeantson*,[76] which Ames describes as 'savouring strongly of tort'.[77] In that case the plaintiff successfully sought restitution against the defendant who obtained the plaintiff's money by promising to marry her, and then in '*grete* deceit' married another.[78] In the third case, the plaintiff was induced by the defendant to become the procurator of the defendant's benefice by the defendant's promise to indemnify the plaintiff in relation to the occupancy.[79] When the defendant secretly resigned the benefice, the plaintiff was 'vexed for the occupancy' and was able to obtain relief against the defendant by subpoena.[80]

The second line of tort-like estoppel cases in Chancery is better known. It falls within the larger group of nineteenth century cases in which the equitable jurisdiction to make good representations was invoked. While some of that broad group of cases were analogous to contract, involving the enforcement of promises on the basis that they had been acted upon,[81] there were several cases in which defendants were ordered to pay what were, in effect, damages for relied-upon misrepresentations. The leading such case is *Burrows v Lock*.[82] The plaintiff proposed purchasing the interest of a beneficiary under a trust, and inquired of the

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[75] Ames, above n 73, 15.
[76] 1 Cal Ch XLI.
[77] Ames, above n 73, 15.
[78] Ibid.
[79] YB 8 Ed IV 4, Pl II.
[80] Ames, above n 73, 15.
[81] Eg: *Hammersley v De Biel* (1845) 12 Cl & F 45; 8 ER 1312.

defendant trustee whether the beneficiary was absolutely entitled to his interest. The defendant replied that he was so entitled and had an undoubted right to make the assignment. The plaintiff duly went ahead with the purchase on the faith of that representation. It later transpired that the defendant had notice of an earlier assignment by the beneficiary of 10 per cent of his interest. Sir William Grant MR held that the defendant was liable to make good the deficiency in the fund.[83] *Burrows v Lock* was followed in *Slim v Croucher*, where the Court of Appeal in Chancery upheld an order for the payment of damages for misrepresentation in analogous circumstances.[84]

The existence of an equitable jurisdiction to order payment of damages for non-fraudulent misrepresentation was subsequently denied by the Court of Appeal in *Low v Bouverie*.[85] The Court of Appeal held that, in the light of the House of Lords' decision in *Derry v Peek* that an action for misrepresentation must be based on fraud,[86] *Burrows v Lock* must be taken to have been decided on the basis of estoppel, and *Slim v Croucher* must be taken to have been wrongly decided.[87] Although the Court of Appeal's decision in *Low v Bouverie* did have the effect of stifling the jurisdiction, it is clear that for most of the nineteenth century the Court of Chancery exercised a jurisdiction to award damages to compensate plaintiffs for loss suffered as a result of reliance on representations made by others.[88]

Unlike the two sets of cases discussed so far, the proprietary estoppel cases can be argued to involve merely the prevention of an unconscionable insistence on legal rights, because the effect of the estoppel was to prevent the representor from unconscionably asserting his or her strict legal title to property. Lord Cranworth LC described the principle as having a negative operation in his famous statement of principle in *Ramsden v Dyson*:

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[82] (1805) 10 Ves Jnr 470; 32 ER 927.
[83] Ibid 929.
[84] (1860) 1 De GF & J 518; 45 ER 462.
[85] [1891] 3 Ch 82.
[86] (1889) 14 App Cas 337.
[87] [1891] 3 Ch 82, 102 (Lindley LJ), 106 (Bowen LJ), 109-10 (Kay LJ).
[88] See Ian Davidson, 'The Equitable Remedy of Compensation' (1982) 13 *Melbourne*

> If a stranger builds on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, *a Court of equity will not allow me afterwards to assert my title to the land* on which he had expended money on the supposition that the land was his own.[89]

The effect of a proprietary estoppel was not, however, a negative one: it was to create new rights and to provide a cause of action where none would otherwise have existed. Although there have been some proprietary estoppel cases in which the estoppel has been asserted defensively,[90] in many cases the estoppel has been used to provide a cause of action. In *The Unity Joint Stock Mutual Banking Association v King*,[91] for example, an estoppel arose against the owner of land who allowed his sons to expend money erecting buildings on that land on the basis that he would transfer the land to them at some time in the future. The effect of the father's conduct and the expenditure of the sons was to raise a 'lien and charge' upon the land to the extent of the amount expended by the sons.[92] The effect of the estoppel was not a negative one, but was clearly to create new rights which, though proprietary in nature, were compensatory in amount.[93]

Like the nineteenth century 'making good representations' cases, the proprietary estoppel cases can also be said to have had both contract-like and tort-like characteristics. Although there are some cases, such as *Dillwyn v Llewlyn*, which are analogous to contract,[94] many examples of proprietary estoppel are more

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University Law Review 349, 356-369.

[89] (1866) LR 1 HL 128, 140-1 (emphasis added).

[90] In *Inwards v Baker* [19645] 2 QB 29, for example, a proprietary estoppel was successfully asserted by a defendant to prevent the plaintiffs from unconscionably asserting their title in an ejectment action.

[91] (1858) 25 Beav 72; 53 ER 563.

[92] Ibid 565.

[93] A similar approach was taken by McLelland J in *Morris v Morris* [1982] 1 NSWLR 61 in satisfying an equity which arose by virtue of the plaintiff having spent money on the defendant's property in the expectation that he was to live there indefinitely. The equity was satisfied by granting the plaintiff an equitable charge over the property to the extent of his expenditure.

[94] (1862) 4 De GF & J 517; 45 ER 1285. The representee's expenditure on the faith of the representor's promise was said to provide a 'valuable consideration', justifying the enforcement

analogous to tort. It is the representor's conduct and the representee's reliance on that conduct which justifies the court's intervention in such cases, and the effect of that intervention clearly goes beyond restraining injustice. When proprietary estoppel operated as it did in *Unity Bank v King*, it can be seen as a hybrid of equity and tort: the application of the doctrine was triggered by detrimental reliance on another's conduct, and the effect of the estoppel was to protect or compensate that reliance by recognising proprietary rights of an equivalent value. Another hybrid case is *Raffaele v Raffaele*,[95] in which the effect of a proprietary estoppel was to give rise to a 'contract or notional contract', the remedy for breach of which was an order for the payment of damages to the representee assessed on a restitutionary basis.[96]

Accordingly, it is not accurate to insist that courts of equity have historically been restricted to preventing an unconscionable insistence on common law rights, and have not been concerned with doing justice in a positive sense by relieving against the detrimental consequences of reliance. In any event, it is clear that the Australian courts have recognised the evolutionary capacity of equitable principles and do not adopt a narrow view of the equitable jurisdiction in relation to estoppel. Accordingly, it is more useful to look at the contemporary cases, and the extent to which those cases can be said to have begun to integrate common law and equitable principle.

2. The Integration of Common Law and Equitable Principles

In terms of the development of estoppel principle, it is important to recognise that the adoption of a reliance-based rationale in the equity cases does involve the use of concepts which have not been emphasised in equity jurisprudence for some time. The reliance-based philosophy of estoppel has its recent origins in common law estoppel, and its adoption, or re-adoption, as the basis of the equitable doctrine is a clear instance of the borrowing of principle which Somers J has

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of the promise (ibid 1287). As discussed in Chapter 1, in *Beaton v McDivitt* (1985) 13 NSWLR 134, Young J regarded the case as having been decided on the basis of contract, although that interpretation was rejected by the Court of Appeal: (1987) 13 NSWLR 162.

[95] [1962] WAR 29.

[96] Ibid 33. The case will be discussed further in Chapter 7.

suggested is taking place between common law and equity, 'furthering the harmonious development of the law as a whole.'[97] An important effect of the movement of equitable estoppel towards a reliance framework, therefore, is to bring the equitable doctrine into alignment with its common law counterpart.

There are at least three different ways in which equitable estoppel can be said to have taken on common law concepts. The first is in the abandonment of the artificial and historically inaccurate notion that estoppel in equity is restricted to preventing an unconscionable insistence on strict rights. In *Waltons Stores* and *Verwayen*, the High Court made it clear that the equitable jurisdiction is not limited to preventing an unconscionable insistence on strict legal rights, but extends to preventing detriment resulting from an unconscionable departure from an assumption that a person will act in a certain way.[98] The second relevant development is the adoption of the common law standard of 'reasonableness' for restricting the situations in which equitable estoppel will be available, and requiring the representee to take some care to protect his or her own interests.[99] The third, and most significant, way in which the common law has influenced equitable estoppel is in the adoption in the equity cases of the common law rationale of protecting against harm resulting from reliance. Paul Finn has observed that the principle which originated in Justice Dixon's judgment in *Thompson v Palmer*,[100] and flowered in *Waltons Stores*,[101] 'reflects both the injury averting concern and the moral ethos of the neighbourhood principle in the law of negligence.'[102] As Chapters 3-7 of this thesis will show, the philosophy of protecting against harm resulting from reliance has been extremely influential in shaping the contemporary equitable doctrine, particularly in relation to questions

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[97] *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180, 193, discussed by Sir Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238, 242.

[98] This positive operation of equitable estoppel was strikingly illustrated in *W v G* (1996) 20 Fam LR 49, which was discussed in Chapter 1 above.

[99] The reasonableness requirement will be discussed in Chapter 5 below.

[100] (1933) 49 CLR 507, 547.

[101] (1988) 164 CLR 387.

[102] Paul Finn, 'Commerce, the Common Law and Morality' (1989) 17 *Melbourne University Law Review* 87, 96.

of remedy.[103] These developments suggest that, through the emphasis on reliance, equitable estoppel is being made more compatible with common law estoppel.

Commentators such as Margaret Halliwell have raised important questions as to the extent to which reliance theory is appropriate in equitable estoppel. Essentially, the questions are whether an equitable doctrine should operate positively to prevent injustice, whether it should be guided by a tort-like rationale of protecting against harm, and whether it can appropriately focus on the victim, rather than the conduct of the person who is claimed to have acted unconscionably. As the above discussion has shown, estoppel in equity has for some time operated positively to prevent injustice, and has at various times in the past been guided by the tort rationale of protecting against harm. In more recent times those aspects of the doctrine have been emphasised more strongly, indicating a subtle integration of common law and equitable principle.[104]

III. CONSCIENCE THEORY

A philosophy of estoppel which has attracted considerable support in Australia and England in the last fifteen years may be described as conscience theory.[105] Conscience theory is based on the notion that equitable estoppel is essentially concerned with the prevention of unconscionable conduct. It is clear that the concept of unconscionability is relevant to an equitable doctrine of estoppel in a very broad sense: it is the representor's unconscionable conduct which is said

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[103] As Chapter 7 will show, the remedial flexibility of the equitable doctrine means that equity is in fact able to fulfil this rationale far better than the common law.

[104] Sir Anthony Mason, 'Equity's Role in the Twentieth Century' (1997-8) *King's College Law Journal* 1, 3 has noted that, 'the principles of equity and the common law are steadily converging into one integrated coherent body of law, that outcome being a desirable and foreseeable consequence of the Judicature Acts' and has elsewhere pointed to estoppel as a 'striking example' of that convergence: Mason, above n 97. Fiona Burns, The "Fusion Fallacy" Revisited' (1993) 5 *Bond Law Review* 152, 163-71 has also argued that recent developments in equitable estoppel raise the possibility of substantive fusion of legal and equitable principles.

[105] A similar philosophy has also been attributed to promissory estoppel in some jurisdictions in the United States. Eric Holmes, 'Restatement of Promissory Estoppel' (1996) 32 *Williamette Law Review* 263, has argued that promissory estoppel is evolving towards, and in some states has reached, a stage where it can be seen as fundamentally equitable (rather than tortious or contractual). Holmes argued that in the final stage of its evolution, promissory estoppel is based on the principles of conscience, good faith, honesty and equity, providing the court with a very broad discretion in relation to remedy.

to justify the intervention of courts of equity in estoppel cases. According to Brennan J in *Waltons Stores*, the element which 'both attracts the jurisdiction of the court and shapes the remedy to be given is unconscionable conduct on the part of the person bound by the equity.'[106] Some judges and commentators appear to go further, however, and regard the prevention of unconscionable conduct as the fundamental purpose of equitable estoppel, and as the primary concept by which it operates.

A. *The Historical Basis of Conscience Theory*

The notion that equitable estoppel is essentially concerned with unconscionable conduct is consistent with equity's traditional concern with matters of conscience. When Edward III referred all matters within the King's 'prerogative of grace' to the Chancellor in 1349, the Chancellor was required by the King's writ to base all decisions on the principles of 'Conscience, Good Faith, Honesty and Equity.'[107] From its earliest days the Court of Chancery was addressed as a court of conscience and the decisive question in most cases before the early Chancellors was whether the defendant could have acted as he did in good conscience. Thus, the duties of the parties were determined by the demands of 'good conscience'.[108] Sir William Holdsworth quotes an entry in the Close Roll of 1468 recording the fact that 'the king willed and commanded ... that all matters to be examined and discussed in the court of Chancery should be dictated and determined according to *equity and conscience*'.[109]

The prominence of conscience in the Court of Chancery can to some extent be attributed to the ecclesiastical backgrounds of the pre-reformation Chancellors,

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[106] (1988) 164 CLR 387, 419. See also *Verwayen* (1990) 170 CLR 394, 428-9 (Brennan J). Chapter 7 will show that the remedy in equitable estoppel cases is not in fact shaped by unconscionable conduct.

[107] George Spence, *The Equitable Jurisdiction of the Court of Chancery* (1846) vol 1, 336-8 & 407-8.

[108] Helmut Coing, 'English Equity and the Denunciatio Evangelica of the Canon Law' (1955) 71 *Law Quarterly Review* 223, 223-4.

[109] Sir William Holdsworth, *A History of English Law* (7th ed, 1955, AL Goodhart and HG Hanbury eds) vol 1, 406. Spence, above n 107, 408, notes that this command was contained in the writ by which Edward IV committed the seals to R Kirkham, Master of the Rolls.

and the resulting influence of canon law on the emerging equitable jurisdiction.[110] 'The ecclesiastical chancellors ... based their equity on the idea that the court ought to compel each litigant to fulfil all the duties which reason and conscience would dictate to a person in his situation.'[111] Conscience was thus the means by which justice according to the law of god or nature could be done in each individual case.[112] The enforcement of promises which were not enforceable at law was one of the primary occupations of the early chancellors, and thus was one of the doctrines framed in the light of conscience.[113]

According to George Spence, the notion of conscience as denoting a principle of judicial decision appears to have been of clerical invention, and invoked the spiritual authority of the ecclesiastical courts over the conscience of the party whose conduct was the subject of complaint.[114] Although the notion of conscience was in the middle ages based on natural law, the principle seems to have been secularised during the sixteenth century, when the Chancellor was designated the 'Keeper of the Queen's conscience.'[115] Spence suggests that the conscience jurisdiction embraced the notion of good faith and all departures from fair dealing and honesty. The early reported cases of what might now be described as equitable estoppel fell within that broad 'good faith' jurisdiction, although the conduct complained of tended to be described as 'fraudulent' rather than 'unconscionable'. The notion of equitable fraud meant, in effect, unconscionable conduct or a violation of the standards of conduct enforced by equity.[116]

A number of examples can be given of the characterisation as fraud of conduct which would now give rise to an estoppel. As mentioned above, JB Ames cites

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[110] Holdsworth, above n 109, 224-5.
[111] Sir William Holdsworth, *A History of English Law* (2nd ed, 1937) vol 5, 216.
[112] Ibid.
[113] OW Holmes Jnr, 'Early English Equity' (1885) 2 *Law Quarterly Review* 162, 171; Paul Vinogradoff, 'Reason and Conscience in Sixteenth Century Jurisprudence' (1908) 24 *Law Quarterly Review* 373, 379.
[114] Spence, above n 107, 411.
[115] PV Baker and PStJ Langan, *Snell's Equity* (29th ed, 1990) 8.
[116] *Nocton v Lord Ashburton* [1914] AC 932, 954; Patrick Parkinson, 'The Conscience of Equity' in Patrick Parkinson (ed), *The Principles of Equity* (1996) 28, 28-30.

a 1378 case in which a plaintiff sought relief on the basis of the defendant's 'deceit' in breaching a relied upon promise to convey land.[117] The act of standing by in circumstances which would now be regarded as establishing an estoppel by acquiescence, was regarded in the early eighteenth century as an 'apparent fraud'.[118] In the nineteenth century case of *Hammersley v De Biel*, Lord Campbell said that representations as to future conduct were required to be made good when acted upon, because otherwise 'the most monstrous frauds would be committed.'[119] Actions relating to representations of fact which were acted upon were also maintained 'upon the ground of fraud and deceit in the defendant.'[120]

Courts exercising equitable jurisdiction today are bound to apply a far more rigid body of principles than their medieval antecedents, and cannot, therefore, be regarded as courts of conscience.[121] As will be seen below, however, there is a clear willingness on the part of modern judges to invoke the concept of unconscionability as both a rationale for equitable estoppel and as a means of determining liability in estoppel. That approach can be seen as a revival of equity's ecclesiastical origins, and appears to draw on the medieval idea of a universal moral code. This notion is supported by Sir Anthony Mason's suggestion that the increased reliance on the concept of unconscionability may be regarded as part of a transition towards a greater emphasis on natural law, and an endeavour to make morals and law coincide.[122]

B. *Support for Conscience Theory*

The notion that unconscionability is the basis of the contemporary doctrine of equitable estoppel has its modern origins in a series of English cases prior to

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[117] Above n 73, 15. This equitable notion of 'deceit' is, of course, quite different from the intentional or reckless disregard for truth which subsequently came to be accepted as deceit at common law in *Derry v Peek* (1889) 14 App Cas 337; see Parkinson, above n 116, 28.
[118] *Savage v Foster* (1723) 9 Mod 35; 88 ER 299, 300.
[119] (1845) 12 Cl & F 45; 8 ER 1312, 1331.
[120] *Evans v Bicknell* (1801) 6 Ves Jun 174; 31 ER 998, 1002.
[121] *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174, 195-6 (Buckley J): 'This Court is not a Court of conscience.'
[122] Mason, above n 97, 259.

Waltons Stores.[123] Unconscionability was invoked in those cases as the standard by which to measure the defendant's conduct in equitable estoppel cases. Although none of those judgments explicitly suggested that the purpose of estoppel was to prevent unconscionable conduct, such a concern is clearly implicit in the adoption of the unconscionability standard. In *Waltons Stores* members of the High Court adopted the concept of unconscionability used in the English cases, and used it to articulate a conscience-based philosophy of the doctrine. In their joint judgment in *Waltons Stores*, Mason CJ and Wilson J held that 'equitable estoppel has its basis in unconscionable conduct, rather than the making good of representations'.[124] Deane J found a similar basis for his general doctrine of estoppel by conduct, notwithstanding the fact that he saw the doctrine as operating at common law as well as in equity:

> The doctrine of estoppel by conduct is founded on good conscience. Its rationale is not that it is right and expedient to save persons from the consequences of their own mistake. It is that it is right and expedient to save them from being victimised by other people.[125]

Thus, in *Waltons Stores* 'the prevention of unconscionable conduct [was] identified as the driving force behind equitable estoppel'.[126] Although the judgments in *Waltons Stores* provided support for a conscience basis for equitable estoppel, they did not do so at the expense of a reliance basis for the doctrine. The two philosophies were clearly seen as complementary. Justice Brennan's judgment exemplifies this most clearly. In the space of three pages, he says that the 'the basic object of the doctrine' is to avoid the detriment which the promisee would suffer if the promisor fails to fulfil the promise', the 'object

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[123] Notably *Crabb v Arun District Council* [1976] 1 Ch 179; *Shaw v Applegate* [1977] 1 WLR 970; *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133; *Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] 1 QB 84.
[124] (1988) 164 CLR 387, 405.
[125] Ibid 440.
[126] *Verwayen* (1990) 170 CLR 394, 407 (Mason CJ).

of equity' is to prevent unconscionable conduct and the 'object of the equity' is to avoid detriment.[127]

Since *Waltons Stores*, most Australian commentators have seen the prevention of unconscionable conduct as the basis or the motivating force of the doctrine of equitable estoppel that emerged from that case.[128] Kenneth Sutton's 1989 article contains perhaps the strongest statement of the unconscionability basis of equitable estoppel in the Australian commentary.[129] That article included the statement that 'the rationale behind the concept of estoppel is said to be good conscience and fair dealing and the object of the concept is recognised as the avoidance of injustice and unconscionable conduct.'[130] Even stronger advocacy of an unconscionability basis for equitable estoppel, however, comes from commentators in England. Mark Lunney supports conscience theory from purposive and normative points of view. He suggests that '[a]ll forms of estoppel have as their foundation the avoidance of unconscionable conduct' and therefore advocates 'a unified doctrine of estoppel based on unconscionability.'[131] A similar argument has been made by Margaret

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[127] (1988) 164 CLR 387, 421-3.

[128] CNH Bagot, 'Equitable Estoppel and Contractual Obligations in the Light of Waltons v Maher' (1988) 62 *Australian Law Journal* 926, 928, appeared to regard the abhorrence of equity to unconscionable conduct as 'the fundamental policy' which drove the Court in that case 'to interfere in situations it previously avoided'; Eugene Clark, 'The Swordbearer has Arrived: Promissory Estoppel and Waltons Stores (Interstate) Ltd v Maher' (1987-9) 9 *University of Tasmania Law Review* 68 ('unconscionability is the unifying principle which forms the basis of the different heads of equity incorporated under equitable estoppel'); Joshua Getzler, 'Unconscionable Conduct and Unjust Enrichment as Grounds for Judicial Intervention' (1990) 16 *Monash University Law Review* 283, 305-6 (the 'unified principle of equitable estoppel' is 'based on the prevention of unconscionable conduct'); JW Carter, 'Chapter 2: Australia' in Ewoud Hondius, *Precontractual Liability: Reports to the XIIIth Congress of the International Academy of Comparative Law* (1990) 29, 37 ('the main object of promissory estoppel is the control of unconscionable conduct'); Mark Dorney, 'The New Estoppel' (1991) 7 *Australian Bar Review* 19, 25 (the 'object of equitable estoppel is to redress unconscionable conduct'); David Allan and Mary Hiscock, *Law of Contract in Australia* (2nd ed, 1992), 517 (there is a "unity" of estoppel, which is now seen as based on unconscientious conduct); Kris Arjunan, 'Waiver and Estoppel - A Distinction Without a Difference' (1993) 21 *Australian Business Law Review* 86, 109 ('unconscionability is the undercurrent of equitable estoppel'); Carter and Harland, above n 34, 133 (unconscionability is 'the touchstone for all relevant forms of estoppel.'); Patrick Parkinson, 'Estoppel' in Patrick Parkinson (ed) *The Principles of Equity* (1996) 201, 203 ('The justification for estoppel is to be found in the concern of the courts with unconscionability').

[129] Kenneth Sutton, 'Contract by Estoppel' (1989) 1 *Journal of Contract Law* 205.

[130] Ibid 221.

[131] Mark Lunney, 'Towards a Unified Estoppel: The Long and Winding Road' [1992] *The Conveyancer and Property Lawyer* 239, 250.

Halliwell, but only in relation to proprietary estoppel.[132] According to Halliwell, '[i]t is now necessary to recognise that the organising concept of [proprietary] estoppel is unconscionability because the function of estoppel is to restrain injustice resulting from unconscionable conduct.'[133] She argues that proprietary estoppel is conscience-based, because the cause of action is not a response to the representee's reliance, but rather to the type of conduct engaged in by the representor.[134]

C. *Unconscionability and Contract Law*

A significant feature of conscience theory as a basis for equitable estoppel is that, like reliance theory, it serves to distinguish equitable estoppel from contract law. The notion that promises are enforced only for the purpose of preventing unconscionable conduct, and to the extent necessary to do so, tends to legitimise equitable estoppel by distancing it from the law of contract.[135] Like the element of detrimental reliance, the element of unconscionability required to establish an estoppel in equity also ensures that equitable estoppel does not undermine the doctrine of consideration by making voluntary promises generally enforceable. Particular emphasis was placed on the requirement of unconscionable conduct in this regard by Dawson J in *Verwayen*:[136]

> It is the requirement of unconscionable conduct which is now seen as the protection against undue intrusion upon the law of contract, for a voluntary promise of itself will not give rise to an estoppel. An estoppel will occur only where unconscionable conduct on the part of one gives rise to an equity on the part of another. The estoppel will then operate to take account of that equity.

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[132] Halliwell, above n 8, 15 & 22-30, distinguishes proprietary estoppel, which she suggests is conscience-based, from promissory estoppel which, she argues, is not based on the concept of unconscionability, but is essentially contractual. Halliwell regards promissory estoppel as a limited exception to the requirement that a variation of a contract must be supported by consideration.
[133] Ibid 15.
[134] Ibid 17.
[135] Ibid.
[136] (1990) 170 CLR 394, 453.

The circularity of that statement reveals the limited utility of the notion of unconscionability in this context. Although Dawson J suggested that an estoppel will occur where unconscionable conduct gives rise to 'an equity' on the part of another person, an 'equity' means no more than a right to equitable relief,[137] which usually arises in circumstances in which the wrongdoer's conduct is characterised as unconscionable. Although the concept of unconscionability is invoked in order to distinguish equitable estoppel from the mere enforcement of voluntary promises, it does not really assist in making that distinction. As the following chapters will show, it is principally detrimental reliance which distinguishes ordinary voluntary promises from those which give rise to an estoppel. As Hugh Collins suggests, if unconscionability meant simply bad faith, then it would be unconscionable to deny all expectations one has created and a sanction would be available for all breaches of promise.[138] If, on the other hand, it is only unconscionable to breach a promise if the promisee has altered his or her position on the faith of the expectation, then 'unconscionability' is simply a very roundabout way of restating the reliance principle.[139]

D. *Conscience Theory and Common Law Estoppel*

Mention must be made of the question whether unconscionability can be said to be the basis of common law estoppel, or of a unified estoppel which is to operate at common law. Michael Evans has questioned whether a notion of unconscionability could be incorporated into common law estoppel, since it is a foreign concept in the common law.[140] Unconscionable conduct in equitable estoppel can, however, be regarded as having its parallel in common law estoppel in the prevention of unjust conduct.[141] Sir Anthony Mason has argued that there is little justification for separate sets of principles for unjust conduct and unconscionable conduct since, 'in the end, "unjust departure" in the context of

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[137] Marcia Neave and Mark Weinberg, 'The Nature and Function of Equities (Part 1)' (1978-1980) 6 *University of Tasmania Law Review* 24. See also Chapter 7 below.
[138] Collins, above n 37, 83-4.
[139] Ibid.
[140] Michael Evans, *Outline of Equity and Trusts*, (2nd ed, 1993) 77.

common law estoppel is in essence describing conduct which is unconscionable.'[142] In *Thompson v Palmer*, Dixon J suggested that the object of estoppel *in pais* at common law was to prevent an 'unjust departure' by one person from an assumption which they have induced another to adopt.[143] The notion that common law estoppel could be based on the prevention of unconscionable conduct also appears to have been accepted by Deane J in *Verwayen*. Although the doctrine of estoppel by conduct articulated by Deane J operates at common law, and appears to draw heavily on common law estoppel, Deane J appeared to be untroubled by the notion of the representee's conscience being fundamental to that doctrine.[144]

E. *The Nature Of A Conscience-Based Doctrine*

Just as the purpose of protecting reliance is best pursued through a reliance-based doctrine of estoppel, or one which focuses on the representee's reliance, the purpose of preventing unconscionable conduct is best pursued through a conscience-based doctrine, or one which operates by reference to the representor's conscience. Mark Lunney[145] and Margaret Halliwell[146] have argued that estoppels should operate by reference to the concept of unconscionability, since their essential purpose is to prevent unconscionable conduct. There are two different ways in which the purpose of preventing unconscionable conduct can be manifested in the operation of a doctrine of estoppel. First, the doctrine could operate by reference to the broad standard of unconscionability. On that basis, liability would depend only on the question whether the representor's conduct could be regarded as unconscionable in all the circumstances, and the courts would grant the relief necessary to prevent unconscionable conduct. Secondly, the requirements for liability and the considerations governing relief could be framed more specifically, but turning on the representor's conscience: which means, in effect, the representor's knowledge and conduct. The first approach

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[141] See *Verwayen* (1990) 170 CLR 394, 453 (Dawson J).
[142] Mason, above n 97, 256
[143] (1933) 49 CLR 507, 547.
[144] (1990) 170 CLR 394, 444.
[145] Above n 131, 250.

would confer a very broad discretion on the court to determine questions of liability and remedy, while the second might be described as a more principled conscience-based approach.

The notion that an equitable estoppel can be established by reference to the broad question whether the representor's conduct was unconscionable in the circumstances has considerable support in the English cases.[147] The strongest statement of such an approach was that of Oliver J in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd*, who held that the only inquiry he had to make was whether, in all the circumstances of the case, it was unconscionable for the representors to seek to take advantage of the mistake which they shared with the representee.[148] Under such an approach, the court simply applies 'the broad test of whether in the circumstances the conduct complained of is unconscionable'.[149] That broad test for establishing liability in equitable estoppel has not been adopted by the Australian courts. As will be discussed in chapter 6, the Australian courts have instead regarded unconscionability as just one of the elements that must be established before equitable estoppel will operate.

Once an estoppel has been established, a broad unconscionability test can also be applied to the question of remedy. As Paul Finn has suggested, the nature and extent of relief can be determined by reference to 'what, in the circumstances it would be unconscionable for the [representor] to insist upon given the responsibility he bears in or for the [representee's] actions.'[150] As Chapter 7 will show, despite prominent judicial pronouncements that relief in equitable estoppel cases is determined by reference to unconscionability, a close examination of the cases shows that the courts do not determine remedies by reference to the unconscionable nature of the representor's conduct.

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[146] Above n 8, 15.
[147] See Chapter 6 below.
[148] [1982] 1 QB 133, 155.
[149] Ibid 154. See also *Crabb v Arun District Council* [1976] 1 Ch 179, 195 (Scarman LJ); *Shaw v Applegate* [1977] 1 WLR 970, 977-8 (Fry J); *Amalgamated Property and Investment Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] 1 QB 4, 104 (Robert Goff J at first instance); *Lim Teng Huan v Ang Swee Chuan* [1992] 1 WLR 133, 117-8 (PC).

An obvious problem with determining questions of liability and remedy by reference to the broad question of unconscionability is its indeterminacy. The question of what is unconscionable involves the making of an open ended moral judgment, and can, therefore, be seen simply as conferring a very broad discretion on the court in the determination of questions of liability and remedy. Others have, therefore, supported a more principled approach to unconscionability. Tadgell J suggested in *Collin v Holden*, for example, that '[w]hat is unconscionable must ... be defined by reference to principle and not left to expediency'.[151] Kirby P has suggested that a principled approach has been adopted to the question of unconscionability: 'offence to conscience being so much a matter of personal opinion, the notion has been tamed and classified according to established categories.'[152]

A more principled conscience-based approach must turn on the knowledge and conduct of the representor, rather than on the effect of the representor's conduct on the representee.[153] As Seddon and Ellinghaus have suggested, '[t]he unconscionability question necessarily involves a consideration of the behaviour of the promisor.'[154] Similarly, Joshua Getzler has observed that the unconscionability principle emphasises 'the knowledge and conduct of the non-innocent party'.[155] That observation is supported by the statement of Deane J in *Verwayen* that the question whether the representor's departure from the relevant assumption would be unconscionable, 'relates to the conduct of the allegedly estopped party in all the circumstances.'[156]

If the fundamental purpose of equitable estoppel is the prevention of unconscionable conduct, then questions of liability and remedy should be

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[150] Finn, above n 69, 92.
[151] [1989] VR 510, 516.
[152] *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582, 585.
[153] Kenneth Sutton, 'A Denning Come to Judgment: Recent Judicial Adventures in the Law of Contract' (1989) 15 *University of Queensland Law Journal* 131, 144 clearly had this type of doctrine in mind when he distinguished equitable estoppel from part performance, on the basis that: 'part performance looks to the acts of the party pleading it while estoppel looks to the action or inaction of the party alleged to be estopped.'
[154] NC Seddon and MP Ellinghaus, *Cheshire and Fifoot's Law of Contract* (7th Aust ed, 1997) 69.
[155] Getzler, above n 128, 323.
[156] (1990) 170 CLR 394, 444.

determined either by reference to the broad test of unconscionability or by a more principled approach which turns on the knowledge and conduct of the person whose conscience is in question, namely the representor. Obviously, some reference to the representee's conduct will also need to be made, but if unconscionable conduct is the foundational norm of equitable estoppel, then the doctrine should, as Margaret Halliwell suggests, be organised around the concept of unconscionability. That means that the key questions in the determination of liability and remedy must direct the court's attention to the knowledge and conduct of the representor.

III. PROMISE THEORY

A. *Why Consider Promise Theory?*

The notion that equitable estoppel has as its purpose, or even one of its purposes, the enforcement of promises is not a notion that enjoys a great deal of support in the Australian cases or commentary. The courts in particular have taken pains to make it clear that the purpose of equitable estoppel is not to enforce promises. In *Verwayen*, for example, McHugh J said that 'the enforcement of promises is not the object of the doctrine of equitable estoppel. The enforcement of promises is the province of contract.'[157] The other two purposes of estoppel outlined in this chapter have been emphasised by the courts because they serve to distance estoppel from contract and to distinguish the operation of equitable estoppel from the enforcement of non-contractual promises. The object of avoiding detriment was claimed by Brennan J in *Waltons Stores* to allay concerns that 'a general application of the principle of equitable estoppel would make non-contractual promises enforceable as contractual promises'.[158] Dawson J in *Verwayen*, on the other hand, pointed out that when the requirement for a pre-existing contractual relationship for equitable estoppel was abandoned, 'the protection of the law of

[157] (1990) 170 CLR 394, 501.
[158] Ibid 423.

contract was seen to lie in the requirement of unconscionable conduct and the discretionary nature of the relief'.[159]

Although it has not been regarded by the courts as a purpose of equitable estoppel, it is important to consider the enforcement of promises as a competing philosophy of equitable estoppel for two reasons. First, the enforcement of a promise, or the fulfilment of expectations engendered by other conduct, is so often the effect of equitable estoppel that one must ask whether the doctrine is fundamentally concerned with achieving that result. This is essentially a legal realist rationale: that what the courts are doing in fact is more important than what they say they are doing. Two American writers, Edward Yorio and Steve Thel, have analysed the United States doctrine of promissory estoppel from this perspective.[160] Yorio and Thel concluded from their examination of the cases that, although most judges and commentators hold that the purpose of promissory estoppel is to protect reliance, what the courts are actually doing is responding to an impulse to enforce serious promises.[161] Yorio and Thel's legal realist analysis suggests that the foundational norm of promissory estoppel is promise enforcement. Similarly, claims that the Australian doctrine of equitable estoppel is concerned only with protecting against harm resulting from reliance, or with the prevention of unconscionable conduct, must be scrutinised carefully when every equitable estoppel case reported in the last 7 years has resulted in the representee's expectations being fulfilled.[162] It is, therefore, important to consider whether equitable estoppel in Australia is essentially concerned with the enforcement of promises.

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[159] Ibid 455. Cf Deane J, ibid 439-40, who appeared to see the protection of contract as lying in the flexible nature of the relief and the fact that estoppel does not of itself provide an independent cause of action for compensatory damages for non-fulfilment of a promise.

[160] Yorio and Thel, above n 9.

[161] Hillman, above n 5, 60-77 has analysed in detail the 'promise theory' of promissory estoppel in the United States, which holds that the doctrine is based on the enforcement of serious promises.

[162] These cases will be discussed in Chapter 7, which will also address the important question whether the prevalence of expectation relief suggests that the doctrine is ultimately concerned with the enforcement of promises, rather than with protecting against the detrimental consequences of reliance or the prevention of unconscionable conduct.

The second reason for considering the possibility that promise is the basis of estoppel is to address the important question whether estoppel is essentially contractual in nature. Despite judicial pronouncements to the contrary, a number of English and Australian commentators have suggested that the fundamental concern of equitable estoppel *is* the enforcement of promises.[163] If that is the case, then there is little justification for differentiating between estoppel and contract. As Peter Birks has argued, if estoppel operates according to the same rationale as contract, and if we are seeking a coherent structure for the law of obligations which avoids duplication, then we must recognise that estoppel is part of the law of contract.[164] Estoppel should, on that basis, be seen as, or adapted to become, part of the law of contract. The essential question, however, is whether estoppel and contract are both essentially concerned with the enforcement of promises.

The purpose of the law of contract is, of course, a notoriously vexed question, but most commentators would support the notion that contract is essentially concerned with the enforcement of promises. The principal argument in contract theory is not *whether* contract is concerned with the enforcement of promises, but rather *why* contract law is concerned to enforce promises or what purpose is served by the law in so doing.[165] Some commentators argue that promises are enforced to protect reliance by the promisee,[166] others see contract law as fulfilling promises on the basis of moral obligation,[167] the facilitation of efficient exchanges,[168] or the enhancement of liberty, by giving parties the

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[163] Burrows, above n 9, 262; Mescher, above n 9, 547-8; Birks, above n 9, 63-4; Atiyah, above n 9; Elizabeth Cooke, above n 9.
[164] Birks, above n 9, 9.
[165] For an overview of contemporary theories of contract, see: Brian Coote, 'The Essence of Contract' (Part 1) (1988) 1 *Journal of Contract Law* 91; Seddon and Ellinghaus, above n 154, 876-909.
[166] See, eg, LL Fuller and William Perdue, 'The Reliance Interest in Contract Damages: 1' (1936) 46 *Yale Law Journal* 52, 60-2; Atiyah, above n 36, 10; Hugh Collins, *The Law of Contract* (1st ed, 1986) 43-7.
[167] Charles Fried, *Contract as Promise* (1981) 41, for example, rationalises the enforcement of promises under contract law on the basis that contractual promises have moral force in the principle of autonomy: 'the parties are bound to their contract because they have chosen to be.'
[168] Many law and economics writers see the enforcement of promises as encouraging value-maximising resource allocation, and hence promoting allocative efficiency: see, eg, Charles Goetz and Robert Scott, 'Enforcing Promises: An Examination of the Basis of Contract' (1980) 89 *Yale Law Journal* 1261, 1265.

freedom to bind themselves.[169] Whatever view one takes of the basis for the enforcement of promises, it is difficult to dispute Andrew Burrows' claim that the cardinal principle of contract law is the fulfilment of expectations engendered by a binding promise.[170] The chapters to follow will consider whether that cardinal principle is shared by the doctrines of estoppel by conduct operating in Australia.

B. *Promise Theory And Common Law Estoppel*

Unlike reliance theory and conscience theory, promise theory may, at first blush, appear to be confined to the equitable and unified doctrines of estoppel, which can operate in relation to a promise to perform certain acts in the future. It may seem unlikely that common law estoppel, which is restricted to assumptions of existing fact, could be based on the enforcement of promises. As Peter Birks has argued, however, a representation of fact which is binding is, in substance, the same as a promise.[171] A person who makes a representation as to an existing fact can undertake an obligation in relation to that representation, in effect to warrant its truth, just as a person who makes a representation relating to their future conduct can do so in such a way as to convey a commitment to act, rather than simply to convey information as to their present intention to behave in a certain way in the future.

From that point of view, therefore, there is no difference in substance between a representation of existing fact, which may or may not be made in such a way as to commit oneself to the truth of the statement, and a representation as to the way in which one intends to act in the future, which similarly may or may not convey a commitment that one will do so. Since equitable estoppel is triggered by an assumption adopted by the representee, rather than a promise made by the representor, it is clear that equitable estoppel is no more or less likely to be concerned with promises than common law estoppel, which is also concerned

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[169] Barnett, above n 9, 300 argues that contractual obligations are enforced because the parties have voluntarily consented to the transfer of alienable rights.
[170] Burrows, above n 9, 217-8.

with assumptions adopted by representees. Both doctrines could potentially be concerned with the extent to which the representor has undertaken a commitment, and both could, therefore, be guided by promise theory.

C. *The Nature Of A Promise-Based Doctrine*

In seeking to ascertain whether equitable estoppel is essentially promise-based in its mode of operation, we are primarily concerned to inquire whether the doctrine is contractual in its operation. If a doctrine of estoppel were essentially concerned with the enforcement of promises, then that concern would be manifested in the approaches to liability and remedy, both of which would turn on the representor's promise, rather than on the representee's reliance on that promise. Under a promise-based doctrine, reliance is, at most, simply a reason for enforcing the promise. The practical importance of the distinction between promise-based liability and reliance-based liability has been recognised by Charles Fried:

> At first glance the distinction between promissory obligation and obligation based on reliance may seem too thin to notice, but indeed large theoretical and practical matters turn on that distinction. To enforce a promise as such is to make a defendant render a performance (or its money equivalent) just because he has promised that very thing. The reliance view, by contrast, focuses on an injury suffered by the plaintiff and asks if the defendant is somehow sufficiently responsible for that injury that he should be made to pay compensation.[172]

In the United States promise theory is a credible basis of the doctrine of promissory estoppel, since a promise is required in order to establish liability. The doctrine has a much closer connection with the law of contract than the Australian doctrine of equitable estoppel, although the nature of that connection is a matter of some debate. Most commentators in the United States appear to see promissory estoppel as separate from the law of contract; the cause of

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[171] Birks, above n 9, 61-2.
[172] Fried, above n 167, 4.

action is seen to be based on protecting promisees against loss resulting from reliance on a promise.[173] In the celebrated case of *Hoffman v Red Owl Stores Inc*, the Supreme Court of Wisconsin suggested that 'it would be a mistake to regard an action based on promissory estoppel as the equivalent of a breach of contract action.'[174] Despite strong statements such as this, promissory estoppel in the United States is seen by some commentators,[175] and by courts in some jurisdictions,[176] in the United States as a form of contractual liability, which exists as an alternative to traditional contractual liability based on consideration being given in return for a promise. That perception of promissory estoppel is, to some extent at least, confirmed by the description of the doctrine in s 90 of the Second Restatement of Contracts. Section 90 appears in the Second Restatement of Contracts under the heading 'Contracts Without Consideration' and stipulates a promise as the only type of conduct on which an estoppel can be founded. The remedy under s 90 is also contract-like, because detrimental reliance on a promise conditionally renders the promise binding. The only concessions in s 90 to a different juridical basis for liability is that the promise is only binding if 'injustice can only be avoided by enforcement of the promise' and that 'the court may alter the remedy as it thinks fit.'

Edward Yorio and Steve Thel have argued that, although s 90 was conceived and drafted to protect reliance, an examination of the decisions under s 90 reveals that the true basis for liability under s 90 is promise, not reliance. On

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[173] Yorio and Thel, above n 9, 112.

[174] 133 NW 2d 267, 275 (1965).

[175] Eg: Mary Becker, 'Promissory Estoppel Damages' (1987) 16 *Hoffstra Law Review* 131, 133 suggests that promissory estoppel liability 'can be understood as contractual in the broad sense that the promisor intended to be legally bound under an objective standard.'

[176] *Black Canyon Racquetball Club Inc v Idaho First National Bank*, 804 P 2d 900, 907 (1991) (Idaho Supreme Court): 'Under contract law, promissory estoppel, when proven, acts as a consideration substitute in the formation of a contract.' Holmes, above n 105, argues that the notion that promissory estoppel is a consideration substitute is adhered to in jurisdictions which are at an early stage (the 'contract phase') in the development of promissory estoppel. He identifies four stages in the development of promissory estoppel: the estoppel phase (in which promissory estoppel has a preclusionary operation, the contract phase (in which promissory estoppel operates as a consideration substitute), the tort phase (in which estoppel is recognised as an independent doctrine which protects reasonable reliance) and the equity phase (in which courts apply promissory estoppel as a flexible doctrine based on equitable notions of conscience, good faith, honesty and equity). He suggests that sixteen jurisdictions in the United States are in the contract phase of development of promissory estoppel, two having remained in the estoppel phase, and the others having moved on to the tort phase or the equity phase.

the question of liability, Yorio and Thel have argued that, although s 90 requires the promise to induce action or forbearance, courts do not always require actual inducement.[177] Nor, they argued, do the courts always insist that the promisee suffer a detriment as a result of reliance on the promise.[178] Equally, the courts occasionally deny recovery despite detrimental reliance by the promisee.[179] This suggests, according to Yorio and Thel, that what the courts do in s 90 cases is to respond to an impulse to enforce serious promises,[180] and '[w]hat distinguishes enforceable promises from unenforceable ones under Section 90 are the proof and quality of the promisor's commitment.'[181]

Similarly, if the basis of equitable estoppel in Australia is promise, then one would expect the courts to look primarily to the promise itself to determine questions of liability and remedy. Questions of liability would turn on the nature of the promisor's commitment, and the circumstances in which it was made. Reliance would take a limited role in determining questions of liability, perhaps simply providing proof of the strength of the promisor's commitment. If the purpose of estoppel was the enforcement of promises, then that purpose could also be manifested in the formulation of relief. Relief would then involve the enforcement of the promise, or the fulfilment of the promisee's expectations, rather than the protection of the promisee against harm resulting from reliance. The following chapters will consider the extent to which those claims can be made of equitable estoppel in Australia, and will thus assess the extent to which it can be regarded as a promise-based doctrine.

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[177] Yorio and Thel, above n 9, 155 cite *Devecmon v Shaw* 14 A 464 (Md 1888) as a classic example of a case in which inducement was not required. The plaintiff's uncle promised that he would pay the expenses of a trip to Europe. After taking the trip, the nephew was able to obtain reimbursement from the uncle's estate for the expenses incurred. The court did not require the plaintiff to prove that he would not have incurred the expenses had the promise not been made, and in fact indicated that they would have enforced the promise had the plaintiff indicated that he would have taken the trip without the promise: 14 A 464, 464-5 (1888).

[178] Yorio and Thel, above n 9, 152.

[179] Ibid 160.

[180] Ibid 114.

[181] Ibid 167.

Chapter 3

THE THRESHOLD REQUIREMENT

The first substantive aspect of the doctrines of estoppel by conduct to be addressed is the threshold requirement. That is, the need for some conduct on the part of the representor, some belief on the part of the representee, or both, which forms the basis of the estoppel. The threshold requirement can be formulated in two different ways, either by emphasising the conduct of the representor, or by emphasising the effect of the representor's conduct on the representee. The threshold requirement of an estoppel relating to an existing fact can be formulated as a representation of fact (representor-sided) or as an assumption as to some existing fact which has been induced by the representor's conduct (representee-sided). Similarly, the threshold requirement of an estoppel relating to the future conduct of a party can be formulated as a promise (representor-sided) or as an induced assumption as to the future conduct of the representor (representee-sided).

It should be made clear at the outset that the distinction between representor-sided and representee-sided approaches to the threshold requirement is a fine one. They are not substantially different approaches, but reflect merely a difference in emphasis. The first test, which requires an induced assumption, involves a consideration of the conduct of the representor (the inducement) and its effect on the representee (the assumption). The second test, which requires a promise or a representation, also involves a consideration of both parties, since the promise or representation will not give rise to an estoppel unless it has induced some action on the part of the representee.

Although the distinction between the two approaches is only a question of emphasis, it remains an important distinction. As this chapter will show, there may be practical consequences resulting from the adoption of one test rather that the other: the requirement of a promise or representation is a stricter threshold test which may be more difficult to satisfy. On the other hand the adoption of the

lower standard of an induced assumption will in some cases shift the court's attention elsewhere, such as to the reasonableness of the representee's reliance. More importantly, however, the choice between the two approaches has important philosophical consequences, helping us to determine whether the doctrines of estoppel operating in Australia are essentially concerned with the representee's reliance or the representor's conduct.

The following discussion will show that the tendency in Australia is toward the representee-sided threshold requirement of an induced assumption, which indicates a greater concern with the representee's reliance than with the representor's conduct. The first part of the chapter looks at the development of this approach, while the second part will illustrate the significance of the distinction.

I. THE DEVELOPMENT OF THE INDUCED ASSUMPTION TEST

Although both common law and equitable estoppel have at times been described as operating in relation to representations,[1] it is clear that neither doctrine has ever required an express representation. It has long been accepted both at common law and in equity that a representation can be conveyed by means other than express words, including a course of conduct and the act of remaining silent. Spencer Bower and Turner list three different ways in which a 'representation' can be made for the purposes of estoppel by representation:

> A representation may, in the first place, be expressed in language either written or spoken. It may, secondly, be implied from acts or conduct. Or, thirdly, under certain conditions, it may be inferred from silence or inaction.[2]

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[1] The common law doctrine is often described as 'estoppel by representation', while the predecessor of the equitable doctrine is often described as the equitable jurisdiction to 'make representations good'.

[2] George Spencer Bower and Sir Alexander Turner, *Estoppel by Representation* (3rd ed, 1977) 45.

A. *The Common Law Cases*

On the common law side, the principle of estoppel by representation could from its very earliest times be invoked on the basis of a wide range of different types of conduct. In one of the leading early statements of the principle, Lord Denman CJ in *Pickard v Sears* held the principle to operate 'where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his previous position'.[3] *Pickard v Sears* was itself a case of estoppel by silence. A mortgagee of certain goods allowed the sheriff to sell those goods under a writ of execution, giving no notice of his interest in the goods to the sheriff or the execution creditor. He was held to be estopped from asserting his title to the goods against the defendant, who purchased the goods from the sheriff. Lord Denman CJ held that the plaintiff's conduct 'in standing by and giving a kind of sanction to the proceedings under the execution' had induced the defendant to believe that he had no interest in the goods, and was sufficient to raise an estoppel.[4] In the subsequent case of *Gregg v Wells*,[5] Lord Denman CJ observed that the principle could be stated more broadly than it was in his judgment in *Pickard v Sears*. He said that it extended to apply to a party who 'negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he cannot contradict'.[6]

Although it has long been clear that a representation has not been required to establish an estoppel, the language of representations has persisted. The Privy Council in *Sarat Chunder Dey v Gopal Chunder Laha* referred to the need for a representation or 'conduct amounting to a representation'.[7] Similarly, in giving the judgment of the House of Lords in *Greenwood v Martins Bank Ltd*, Lord Tomlin held that one of the 'essential factors giving rise to estoppel' was a

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[3] (1837) 6 A & E 469; 112 ER 179, 181.
[4] Ibid.
[5] (1839) 10 A & E 90; 113 ER 35.
[6] Ibid 38, quoted with approval by Parke B in *Freeman v Cooke* (1848) 2 Ex 654; 154 ER 652, 656.
[7] (1892) 19 LR Ind App 203, 215.

'representation or conduct amounting to a representation'.[8] The language of induced assumptions, which now dominates the Australian cases, appears to have originated the following year in the judgment of Dixon J in *Thompson v Palmer*.[9] Although the judgment of the House of Lords in *Greenwood v Martins Bank Ltd* was cited by Dixon J in *Thompson v Palmer*, he articulated the principles of estoppel *in pais* in the language of assumptions, forsaking the language of representations used by the House of Lords.[10] Dixon J described both the object of estoppel *in pais* and its operation in terms of assumptions:

> The object of estoppel *in pais* is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that party's detriment.[11]

Dixon J went on to describe the circumstances in which a person would be required to abide by an assumption in terms of the part played by that person in 'occasioning its adoption' by the other party.[12] He set out a variety of situations in which the part played by the representor in occasioning the adoption of the assumption was sufficient to render it 'unjust and inadmissible' for the representor to depart from the assumption.[13] The plea of estoppel in that case ultimately failed in the opinion of Dixon J because, although the appellant could establish that she had formed a belief as to the existence of a particular state of affairs, she failed to establish that she had acted to her prejudice on the faith of that belief.[14]

The notion that estoppel *in pais* was based on the adoption of an assumption was reiterated in the joint judgment of Rich, Dixon and Evatt JJ in *Newbon v City*

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[8] (1933) AC 51, 57.
[9] (1933) 49 CLR 507, 547
[10] The other members of the High Court, in contrast, followed the approach of the House of Lords and framed their discussions of estoppel almost entirely in the language of representations: ibid 520-1 (Rich J), 526-7 (Starke J), 551-3 (Evatt J), 558-9 (McTiernan J).
[11] Ibid 547.
[12] Ibid.
[13] Ibid.
[14] Ibid 548-9.

Mutual Life Assurance Society Ltd,[15] and in Justice Dixon's influential judgment in *Grundt v Great Boulder Pty Gold Mines Ltd.*[16] The principle articulated by Dixon J in *Grundt* was concerned with an assumption adopted by the representee, rather than a representation being made by the representor.[17] He referred to the representee acting on the assumption, to the harm that would result if the assumption were deserted, and to the court avoiding such harm by compelling the representor to adhere to the assumption.[18]

B. *The Equity Cases*

On the equity side, the language of representations dominated the nineteenth century line of cases concerned with 'making good representations',[19] but has not been so dominant in the modern cases of proprietary and promissory estoppel. Because many of the early proprietary estoppel cases concerned situations in which the representor stood by with knowledge of the representee's detrimental reliance, the courts were generally concerned to inquire whether the representor had 'encouraged an act', rather than whether a representation had been made or an assumption induced. The leading early cases of *Dann v Spurier*,[20] *Gregory v Mighell*,[21] *The Duke of Beaufort v Patrick*[22] and *Dillwyn v Llewelyn*[23] all afford examples of such an approach.

In *Ramsden v Dyson*,[24] on the other hand, there was a live issue as to the nature of the representee's assumption or expectation. Accordingly, the House of Lords did define the applicable equitable principle, and did so by reference to an

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[15] (1935) 52 CLR 723, 734-5. Cf the approach of Starke J, ibid 738.
[16] (1937) 59 CLR 641.
[17] The significance of the language used by Dixon J was noted by Priestley JA in *Waltons Stores (Interstate) Ltd v Maher* (1986) 5 NSWLR 420, when he pointed out that 'neither in *Thompson* nor in *Grundt* did Dixon J use the word "representation" as indicating a necessary element in his formulation of estoppel in pais.'
[18] (1937) 59 CLR 641, 674.
[19] Eg: *Evans v Bicknell* (1801) 6 Ves 174; 31 ER 998, 1002; *Burrowes v Lock* (1805) 10 Ves 470; 32 ER 927 929; *Hammersley v De Biel* (1845) 12 Cl & F 45; 8 ER 1312, 1320; *Low v Bouverie* [1891] 3 Ch 82 (discussed below, text accompanying nn 78-85).
[20] (1802) 7 Ves 231; 32 ER 94.
[21] (1811) 18 Ves Jun 328; 34 ER 1211, 1211.
[22] (1853) 17 Beav 59; 51 ER 955, 960.
[23] (1862) 4 De GF & J 517; 45 ER 1285, 1287.

assumption or expectation. Lord Cranworth LC and Lord Wensleydale defined the principle narrowly, confining it to a situation where 'a stranger begins to build on my land *supposing it to be his own*, and I, perceiving his mistake, abstain from setting him right'.[25] Lord Kingsdown stated the applicable principle in much broader terms. The principle articulated by Lord Kingsdown depended on a person laying out money on land on the faith of an agreement for an interest in the land or on the faith of 'an expectation, created or encouraged by the landlord, that he shall have a certain interest' in the land.[26] Although Lord Kingsdown's was a dissenting judgment, his statement of principle was quoted with approval by the Privy Council in *Plimmer v Mayor of Wellington*[27] and has proved more influential in subsequent cases, on the explicit assumption that Lord Kingsdown differed from the majority judges only on the inferences to be drawn from the facts.[28] Accordingly, the doctrine of proprietary estoppel can be seen to be based on the representee-sided notion of an assumption or 'expectation' which has been 'created or encouraged' by the representor's conduct.

The foundational promissory estoppel cases were also more concerned with the effect of the representor's conduct on the representee, rather than the nature of that conduct itself. That is no doubt attributable to the fact that the two cases on which the principle of promissory estoppel is based, *Hughes v Metropolitan Railway Co*,[29] and *Birmingham and District Land Co v London and North Western Railway Co*,[30] did not involve express promises, but rather assumptions induced by a course of conduct or silence. In each case one of the parties to an agreement had a limited period of time in which to perform certain acts (in

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[24] (1866) LR 1 HL 128.

[25] Ibid 140 (Lord Cranworth LC) (emphasis added); 168 (Lord Wensleydale to similar effect). Lord Cranworth's narrow definition of the applicable principle may be attributed to a concern not to offend the principle he laid down in *Jorden v Money* (1854) 5 HLC 185; 10 ER 868, 881-2, that an estoppel can only arise in relation to a representation of existing fact and not a representation of future intention. The broader statement of Lord Kingsdown in *Ramsden v Dyson* seems quite inconsistent with *Jorden v Money*: see Mark Lunney, 'Jorden v Money - A Time for Reappraisal' (1994) 68 *Australian Law Journal* 559, 572.

[26] (1866) LR 1 HL 129, 170.

[27] (1884) 9 App Cas 699, 710.

[28] See, eg: *Inwards v Baker* [1965] 2 QB 29, 36-7 (Lord Denning MR), 38 (Danckwerts LJ); *Pascoe v Turner* [1979] 2 All ER 945, 949 (Cumming-Bruce LJ for the Court of Appeal); *Crabb v Arun District Council* [1976] 1 Ch 179, 188 (Lord Denning MR), 193-4 (Scarman LJ).

[29] (1877) 2 App Cas 439 ('*Hughes*').

Hughes, the making of repairs to demised premises, in *Birmingham* the completion of building works) on pain of a penalty or forfeiture. In neither case was an express promise or representation made that those obligations would be suspended, but rather the parties entered into correspondence which led the representee to believe that the obligation in question would be superseded by events. The principle articulated by Lord Cairns LC in *Hughes* applied where parties to a contract involving a penalty or forfeiture had entered into negotiations which 'had the effect of *leading one of the parties to suppose* that the strict rights under the contract will not be enforced'.[31] The broader statement of principle by Bowen LJ in *Birmingham* was not restricted to cases involving a forfeiture, but applied wherever 'persons who have contractual rights *induce by their conduct* those against whom they have such rights' to believe that those rights would not be enforced or would be suspended.[32] Neither principle was dependent on the representor engaging in a *particular* type of conduct: each depended on the broader, representee-sided requirement that some conduct on the part of the representor has induced the adoption of an assumption by the representee.

The principle extracted from those cases and others[33] by Denning J in *Central London Property Trust Ltd v High Trees House Ltd* was of quite a different nature, however, since it was based on a particular type of conduct being engaged in by the representor.[34] The label 'promissory estoppel' is particularly apt to describe the principle outlined by Denning J, since the foundation of the doctrine was clearly the representor's conduct itself, rather than the representee's reliance on that conduct.[35] As Don Greig and Jim Davis have observed, although it was

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[30] (1888) 40 Ch D 268 ('*Birmingham*').
[31] (1877) 2 App Cas 439, 447 (emphasis added).
[32] (1888) 40 Ch D 268, 286 (emphasis added).
[33] *Fenner v Blake* [1900] 1 QB 426; *In re Wickham* (1917) 34 TLR 158; *Re William Potter & Co Ltd* [1937] 2 All ER 361; *Buttery v Richard* [1946] WN 25; *Salisbury (Marquess) v Gilmore* [1942] 2 KB 38.
[34] [1947] 1 KB 130.
[35] Denning LJ articulated the principle more clearly in his judgment in the Court of Appeal in *Combe v Combe* [1951] 2 KB 215, 220:

> The principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance has

difficult to escape the conclusion that the principle did represent a form of estoppel, Denning J attempted to distil from the earlier decisions a principle based on promise, intention and reliance.[36] As will be seen in the next chapter, the 'reliance' aspect of the principle was extremely weak, leaving the principle based essentially on promise and intention.

When the principle of promissory estoppel was applied in *Je Maintiendrai Pty Ltd v Quaglia*,[37] the South Australian Supreme Court was strongly influenced by the approach formulated by Dixon J in *Thompson v Palmer* and *Grundt v Great Boulder Pty Gold Mines Ltd* in relation to estoppel *in pais*. The equitable principle applied in *Je Maintiendrai*, like the common law principle outlined by Dixon J, emphasised the representee's reliance, rather than the representor's conduct and intentions.[38] King CJ in particular emphasised the similarity between estoppel *in pais* and promissory estoppel, and said he could see no valid reason for making a distinction between them.[39] Both types of estoppel, he said, rest on the injustice to the representee or promisee of allowing a representor or promisor to depart from the representation or promise where the representee or promisee would suffer detriment as a consequence.[40]

C. *The Contemporary Australian Approach*

The tendency in the modern High Court estoppel cases has been toward applying Justice Dixon's approach to both common law and equitable estoppel, treating both as based on the threshold requirement of an assumption induced by the representor's conduct.[41] In the first of those cases, *Legione v Hateley*,[42] the court

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been made by him, but he must accept their legal relations subject to the qualification which he himself has introduced, even though it is not supported in point of law by any consideration but only by his word.

[36] DW Greig and JLR Davis, *The Law of Contract* (1987) 141-2.

[37] (1980) 26 SASR 101.

[38] Ibid 105-6 (King CJ), 113-5 (White J), 120 (Cox J).

[39] Ibid 106.

[40] Ibid.

[41] A similar approach has been taken in New Zealand. In *Prudential Building and Investment Society of Canterbury v Hawkins* [1997] 1 NZLR 114, 121, Hammond J held it to be the conventional view that three elements must be established for equitable estoppel to arise: 'the creation or encouragement of a belief or expectation; reliance by the other party; and detriment

was decisively split between the two different approaches to the threshold requirement for promissory estoppel. The minority favoured the 'induced assumptions' approach of Dixon J, while the majority required a clear representation or promise by the representor. That case provides a very good illustration of the practical significance of the choice between the two approaches, and will be discussed in detail below. In contrast with those in *Legione v Hateley*, the judgments in the more recent cases have tended to emphasise the effect of the representor's conduct on the representee, rather than the nature of the conduct engaged in by the representor.

In *Waltons Stores (Interstate) Ltd v Maher*,[43] both the equitable estoppel applied by the majority and the common law estoppel applied by the minority were based on the threshold requirement of an assumption induced by the representor's conduct. Waltons had negotiated to lease land from Mr and Mrs Maher, on terms which required the Mahers to demolish the existing building and construct a new building on the land. Waltons required the lease to be completed by a particular date. When negotiations were close to completion, the Mahers told Waltons' representatives that the agreement would have to be concluded within a day or two to allow the building works to be completed by that date. On the same day, Waltons' solicitors sent engrossed copies of the lease to the Mahers' solicitors, noting that they were awaiting formal approval of some last-minute amendments requested by the Mahers, which had been verbally approved. Waltons' solicitors agreed to inform the Mahers' solicitors on the following day if any of the amendments were not agreed to. The engrossed copies of the lease were then duly signed by the Mahers and returned 'by way of exchange'. The Mahers heard nothing further from Waltons or their solicitors for over two months. Because of the urgency about completing the building works in time for the commencement of the lease, the Mahers began to demolish the existing building on the site. Waltons knew of this, but instructed their solicitors to 'go slow' on the transaction with the Mahers, since

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as a result of that reliance.' Those three elements had been articulated by Richardson J in *Gillies v Keogh* [1989] 2 NZLR 327, 346.

[42] (1983) 152 CLR 406, 421 (Gibbs CJ and Murphy J).

Waltons was conducting a review of its retailing strategy in country areas which could, and ultimately did, make the new store redundant. It was only when the demolition was complete, and the building works had commenced, that Waltons informed the Mahers that it did not intend to proceed with the transaction because of a change in retailing policy.

The joint judgment of Mason CJ and Wilson J proceeded on the footing that the threshold requirement of both common law and equitable estoppel is that one party must have been induced to adopt an assumption, or encouraged to act on the basis of an assumption, by the conduct of another party. They found that the relevant assumption adopted by the Mahers was that an exchange of contracts *would* take place as a matter of course, and the facts did not justify the inference that they assumed that exchange *had* taken place or that a binding contract had been formed. Accordingly, there was no assumption of existing fact on which a common law estoppel could be founded.[44] They did, however, find that a promissory estoppel arose, based on Waltons' inaction in the circumstances, which 'constituted clear encouragement or inducement' to the Mahers to continue to act on the basis of the assumption that an exchange would take place.[45]

Brennan J also regarded an induced assumption as the threshold requirement of both common law and equitable estoppel. A common law estoppel *in pais* arises, he said, where a party 'induces another to make an assumption that a state of affairs exists, knowing or intending the other to act on that assumption'.[46] Similarly, to establish an equitable estoppel, it is necessary for a plaintiff to prove, first, that he or she assumed that a particular legal relationship existed or would exist between the plaintiff and the defendant and, secondly, that the defendant induced the plaintiff to adopt that assumption or expectation.[47] Like Mason CJ and Wilson J, Brennan J held that the Mahers

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[43] (1988) 164 CLR 387 ('*Waltons Stores*').
[44] Ibid 397-9.
[45] Ibid 407.
[46] Ibid 413.
[47] Ibid 428-9.

had assumed that Waltons would complete the exchange of contracts, and Waltons' silence in the circumstances induced the Mahers to continue to act on that assumption.[48]

The principle of 'estoppel by conduct' applied by Deane J also depended on one party being induced by another to adopt an assumption. Deane J found that Waltons' 'retention of the executed counterpart and its deliberate silence and inaction' caused the Mahers to adopt an assumption that a binding agreement existed, and to act on that assumption to their detriment.[49] The principle of estoppel by conduct applied by Deane J operated equally at common law and in equity and applied to an assumed future state of affairs in the same way as to an assumed fact.[50] Accordingly, Deane J said that the result would have been the same if the assumption that Waltons led the Mahers to adopt was an assumption relating to its future conduct; namely, that Waltons would exchange contracts in due course.[51]

Gaudron J also adopted the language of assumptions, differentiating between common law and equitable estoppels on the basis that the former 'operate by reference to an assumption of fact', while the latter 'operate by reference to an assumption as to rights.'[52] Gaudron J found that the Mahers had assumed that exchange had taken place, which was an assumption of fact, raising the potential application of common law estoppel. The relevant issue was, therefore, whether Waltons had '*so contributed to the assumption* ... that it would be unjust or unfair if it were left free to ignore it.'[53] She found that Waltons' failure to inform the Mahers that its attitude had changed was a 'proximate cause' of the Mahers' adoption of the assumption.[54] Thus, the threshold requirement for common law estoppel was met.

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[48] Ibid 429.
[49] Ibid 444.
[50] Ibid 446-52.
[51] Ibid 446.
[52] Ibid 458.
[53] Ibid 461 (emphasis added).
[54] Ibid 463.

The importance of *Waltons Stores* in the development of the threshold requirement for estoppel is that all varieties of estoppel applied by members of the High Court (equitable estoppel, a unified doctrine and common law estoppel) were based on the need for the representee to have adopted an assumption as a result of the representor's conduct. As the High Court moved in *Commonwealth v Verwayen* towards a substantive doctrine of equitable estoppel, the assumptions-based approach adopted in *Waltons Stores* was clearly favoured by a majority of the court both in abstract formulations of the applicable principles and in the applications of those principles to the facts.[55] The relevant facts were as follows.

Mr Verwayen was injured in 1964 in the collision of the naval vessels HMAS Voyager and HMAS Melbourne. Along with other sailors injured in the collision, Verwayen did not institute proceedings against the Commonwealth for some twenty years, assuming he was not owed a duty of care in those circumstances. A High Court decision in 1982 cast doubt on that assumption.[56] Following that decision, Verwayen instituted proceedings against the Commonwealth in 1984, claiming damages for negligence. The Commonwealth did not plead the limitations defence which was open to it, and nor did it deny that it owed a duty to Verwayen. Representations were made on behalf of the Commonwealth that a policy decision had been made not to plead those defences in any actions brought by survivors of the collision. In reliance on those representations, Verwayen continued to prosecute his action against the Commonwealth until 1986, when the Commonwealth sought leave to amend its defence to plead the relevant defences. The nature of the detriment Verwayen stood to suffer if the Commonwealth was allowed to depart from the assumption was not identified with precision because of the way in which the matter came before the Court,[57] but it included at least wasted expense and inconvenience in prosecuting the action, and may also have included increased

[55] (1990) 170 CLR 394, 413 (Mason CJ, unified doctrine), 444-5 (Deane J, unified doctrine), 460 (Dawson J, equitable estoppel), 487 (Gaudron J, substantive doctrine of estoppel), 500 (McHugh J, equitable estoppel).
[56] *Groves v Commonwealth* (1982) 150 CLR 113.
[57] See (1990) 170 CLR 394, 416 (Mason CJ) and 449 (Deane J).

stress, anxiety and increased ill health.[58] Verwayen claimed that the Commonwealth had irrevocably waived its right to plead the defences in question, or that an estoppel arose which prevented the Commonwealth from relying on those defences.

Mason CJ decided the case on the basis of a unified doctrine of estoppel which operates at common law and in equity and applies where a person 'has relied upon an assumption as to a present, past or future state of affairs' which has been induced by the party estopped.[59] The Chief Justice's application of that doctrine to the facts was also based on an induced assumption as the threshold requirement. Mason CJ found that the Commonwealth's conduct induced Verwayen 'to assume that the Commonwealth had made a decision not to plead the limitation defence or the *Groves* defence and that that decision would not be changed.'[60] He also found that assumption was a reasonable assumption for a person in Verwayen's position to make.[61] Since Verwayen continued his action against the Commonwealth on the faith of that assumption, an estoppel did arise against the Commonwealth, but an order for costs was a sufficient recompense for the detriment suffered by Verwayen. Accordingly, the estoppel did not prevent the Commonwealth from relying on the defences in question.[62]

Deane J also decided the case on the basis of a unified doctrine of estoppel by conduct and, like Mason CJ, articulated the principles of that doctrine on the basis of an induced assumption. The threshold requirement for the doctrine was an assumption adopted by a party as the basis of some action or inaction which would operate to that party's detriment if the assumption was not adhered to by the representor. Deane J spelt out in some detail the circumstances in which a representor is regarded as playing such a part in the 'adoption of, or persistence in the assumption' that departure from it would be unconscionable.[63] He held that the Commonwealth induced Verwayen's assumption that 'his action for damages

[58] Ibid 448-9 (Deane J).
[59] Ibid 413.
[60] Ibid 414.
[61] Ibid.
[62] Ibid 416-7.

for negligence would proceed against the Commonwealth and be determined on the basis that liability was admitted.'[64] Deane J found that Verwayen had suffered substantial detriment on the faith of that assumption, which was of such a nature that it was not unjust to hold the Commonwealth to the assumed state of affairs on the basis of which it had induced Verwayen to act.[65]

Dawson J also decided the case in favour of Verwayen, but on the basis of equitable estoppel. In formulating the principles of that doctrine, Dawson J drew on the principles of estoppel by conduct articulated by Dixon J in *Thompson v Palmer* and *Grundt v Great Boulder Pty Gold Mines Ltd*, regarding Justice Dixon's notion of 'unjust departure from an assumption' as equally relevant to an assumption with respect to future conduct.[66] In his application of the principles of equitable estoppel to the facts, Dawson J spoke consistently of the assumption adopted by Verwayen. Verwayen was, he said, led by the Commonwealth's conduct to assume that the latter would not raise a defence of limitation.[67]

McHugh J also analysed the principles of common law and equitable estoppel in terms of an induced assumption. The equitable doctrine, he said, creates new rights where one party has 'induced the other party to assume that a different legal relationship exists or will exist between them'.[68] Although, like Mason CJ, he found that the evidence of detriment was insufficient, he was prepared to assume that the first of the elements listed by Brennan J in *Waltons Stores* had been made out. That was a requirement that the plaintiff had assumed that a particular legal relationship existed or would exist between the plaintiff and the defendant.[69]

In contrast to the approach adopted by the other members of the Court in *Verwayen*, and in contrast to his own approach in *Waltons Stores*, Brennan J

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[63] Ibid 444.
[64] Ibid 447.
[65] Ibid 449.
[66] Ibid 453.
[67] Ibid 460.
[68] Ibid 500.
[69] Ibid 502.

discussed equitable estoppel exclusively in terms of promises and representations. Equitable estoppel, he said, 'ensures that a party who acts in reliance on what another has *promised or represented* suffers no unjust detriment thereby.'[70] He characterised the Commonwealth's conduct as a promise, and considered the application of the principles of estoppel in terms of the detriment Verwayen would suffer as a result of his reliance on the Commonwealth's promise.[71] Brennan J did not consider that the Commonwealth was estopped from pleading the relevant defences, but would have ordered the matter to be remitted to the trial judge to ascertain the extent of Verwayen's detriment.[72]

The judgments in *Waltons Stores* and *Verwayen* reveal a strong tendency towards a focus on induced assumptions, rather than representations or promises, in the formulation and application of the principles of common law estoppel, equitable estoppel and the unified doctrines. Thus, the representee-sided approach to the threshold requirement, which was developed by Dixon J in *Thompson v Palmer* in relation to common law estoppel, has come to dominate all manifestations of estoppel by conduct.[73] Although there were occasional references in *Waltons Stores*, *Foran v Wight*,[74] and *Verwayen*[75] to the representor-sided requirements of promises and representations, the main focus in each case was not on the type of conduct engaged in by the representor, but rather its effect on the representee.

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[70] Ibid 423 (emphasis added).
[71] Ibid 428-30.
[72] Ibid 431.
[73] The 'induced assumption' approach to the threshold requirement has also dominated the cases since *Verwayen*, see, eg: *Burnside Sub-Branch RSSILA Inc v Burnside Memorial Bowling Club Inc* (1990) 58 SASR 324; *Australian Securities Commission v Marlborough Gold Mines* (1993) 177 CLR 485, 506 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ); *S & E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122 ALR 637, 651-656 (Neaves, Gummow and Higgins JJ); *Commonwealth v Clark* [1994] 2 VR 333, 361-84 (Ormiston J); *Morris v FAI General Insurance Company Ltd* (1995) 8 ANZ Ins Cas 61-258, 75,884-5; *W v G* (1996) 20 Fam LR 49, 66 (Hodgson J); *Lyndel Nominees Pty Ltd v Mobil Oil Australia Ltd* (1997) 37 IPR 599, 627-8 (Wilcox J), although the language of representations continues to be used occasionally, see, eg: *Standard Chartered Bank Aust Ltd v Bank of China* (1991) 23 NSWLR 164, 177-81 (Giles J); *Austral Standard Cables Pty Ltd v Walker Nominees Pty Ltd* (1992) 26 NSWLR 524, 538-41 (Handley JA); *Territory Insurance Office v Adlington* (1992) 109 FLR 124, 127 (Mildren J).
[74] (1989) 168 CLR 385, 411-2 (Mason CJ), 435-6 (Deane J), 449 (Dawson J).
[75] Most notably in the judgment of Brennan J (1990) 170 CLR 394, 423, 429-30, in which the language of promises and representations was consistently used.

Kevin Lindgren has also observed the movement towards a foundation for estoppel which requires an assumption, rather than a particular type of conduct on the part of the representor.[76] He has noted that this movement has a tendency towards unifying the various types of estoppel operating at common law. Equally, it can be said that the movement has a tendency towards unifying common law and equitable estoppel, since it renders less important the distinction between promissory conduct and representational conduct. After *Waltons Stores* and *Verwayen*, it is clear that both the equitable and common law doctrines are founded on the adoption of an assumption by the representee, rather than on a particular type of conduct being engaged in by the representor.[77] The requirement of an assumption does not, however, remove the most fundamental difference between common law and equitable estoppel, since we are left with the distinction as to the nature of the assumption adopted: between assumptions of existing fact and assumptions relating to the representor's future conduct.

II. THE SIGNIFICANCE OF THE DISTINCTION

A. *Induced Assumptions and Representations*

Although the courts have not sought to draw any distinction between the 'representation' approach and the 'induced assumption' approach, there is a philosophical difference, and potentially also a practical difference, between the two approaches. From a philosophical point of view, the choice illustrates the basic dichotomy in estoppel by conduct between, on the one hand, a concern with the conduct of the representor and, on the other, a concern with the position of the representee. A representation requirement is consistent with the notion that the doctrines are conscience-based, and are concerned with preventing a certain type of conduct. The representation requirement helps to define the type of conduct

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[76] Kevin Lindgren, 'Estoppel in Contract' (1989) 12 *University of New South Wales Law Journal* 153, 156.

[77] The position may be different in England. In *Sledmore v Dalby* (1996) 72 P & CR 196, 207 Hobhouse LJ suggested that the emphasis in estoppel by representation is on the representation, which must be clear and unequivocal, and 'provided there is reliance, the detriment element may be limited.' In proprietary estoppel, he suggested, the emphasis is the other way around, and while the detriment 'must be distinct and substantial', the conduct of the representor 'may

regarded as unconscionable. A representor-sided approach is also consistent with the notion that the doctrines are essentially concerned with the enforcement of promises and representations, and that liability stems primarily from the promise or the representation itself. An induced assumption requirement, on the other hand, is more consistent with the notion that the doctrines are reliance-based, and are essentially concerned with protecting against a certain type of harm. The role of the threshold requirement in a reliance-based doctrine is simply to help to define the type of harm against which the law provides protection.

There is also a significant difference in emphasis between the representation requirement and the induced assumption requirement, which may well have practical consequences. The importance of the distinction can be illustrated by reference to two cases, *Low v Bouverie*[78] and *Legione v Hateley*, each of which turned on a failure on the part of the representee to fulfil a strict, representor-sided threshold requirement. The plaintiff in *Low v Bouverie* proposed lending money to a borrower on the security of the borrower's beneficial life interest in certain property. The plaintiff's solicitors wrote to the defendant, who was one of the trustees of the property, to inquire whether the borrower had mortgaged or parted with his life interest in the property. In his reply, the defendant disclosed the existence of two encumbrances on the property, but failed to disclose the existence of several others of which he had received notice, but forgotten. On the faith of that assurance, the plaintiff entered into the proposed transaction. The borrower was subsequently declared bankrupt and, as a result of the prior mortgages, the plaintiff's security was worthless.

The trial judge held that the defendant was liable to pay damages to the plaintiff for misrepresentation, on the authority of *Burrowes v Lock*[79] and *Slim v Croucher*,[80] both cases in which representations had been ordered to be made good in equity. The decision of the trial judge was overturned by the Court of Appeal on the basis that, following the decision of the House of Lords in *Derry v*

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be no more than acquiescence.'

[78] [1891] 3 Ch 82.

[79] (1805) 10 Ves 470; 32 ER 927.

Peek,[81] an action for damages for misrepresentation could not be maintained in the absence of fraud.[82] The Court of Appeal therefore approached the matter on the basis of estoppel. Had the plaintiff been able to make out an estoppel, the plaintiff would have been entitled to recover the value of the life interest from the defendant as trustee, subject only to the encumbrances disclosed by the defendant. The defendant would have been estopped from asserting the existence of the undisclosed prior encumbrances.[83]

The Court of Appeal found that no estoppel could be made out because there was no clear and unambiguous statement that the borrower's interest in the property was not subject to encumbrances other than those disclosed. The requirement of precise and unambiguous language could not be fulfilled because the words used by the defendant could be understood to mean that the encumbrances disclosed were all he remembered at the time.[84] In other words, they could be construed as a statement of his belief, without an assertion that what he believed was in fact true.

If one were to approache the question of estoppel in *Low v Bouverie* from the perspective of what the plaintiff assumed, rather than what the defendant represented, the pivotal inquiry would be an altogether different one. It seems to have been accepted that the plaintiff did assume that the property was not subject to any encumbrances other than those disclosed by the defendant. That assumption was clearly induced by the defendant's conduct. It also seems clear that the plaintiff acted, by lending the money, on the faith of the assumption, and suffered a substantial loss as a result of that action when the assumption proved to be untrue. If the court had looked at what the plaintiff assumed, rather than what the defendant represented, therefore, the central question for the court would have been whether the plaintiff acted reasonably in adopting and acting

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[80] (1860) 1 De GF & J 518; 45 ER 462.
[81] (1889) 14 App Cas 337.
[82] The Court of Appeal held that *Slim v Croucher* had been wrongly decided, and that *Burrowes v Lock* could only be supported on the basis of estoppel: [1891] 3 Ch 82, 102 (Lindley LJ), 106 (Bowen LJ), 109 (Kay LJ).
[83] Ibid 103 (Lindley LJ), 106 (Bowen LJ), 113 (Kay LJ).
[84] Ibid 103 (Lindley LJ), 106 (Bowen LJ), 114 (Kay LJ).

upon the relevant assumption, rather than whether a clear and unambiguous statement had been made by the defendant. It must be conceded that the result in the case would be unlikely to have been different, since all three members of the court appeared to be of the opinion that the plaintiff 'too hastily inferred' that no other encumbrances existed.[85] The case would, however, have turned on considerations quite different from those that occupied the court, and the court's attention would have been focussed squarely on the conduct of the plaintiff, rather than on that of the defendant.

The difference between an assumption-based approach and a representation-based approach may well have affected the result of the High Court's decision in *Legione v Hateley*.[86] The former approach was adopted by Gibbs CJ and Murphy J, who found that an estoppel did arise, while the latter was followed by Mason and Deane JJ, who held that no estoppel arose. The case concerned a contract for the sale of land. The purchasers failed to complete the purchase on the due date. The vendors then served a notice of intention to rescind the agreement if the purchase was not completed by 10 August. On 9 August, the purchasers' solicitor telephoned the vendors' solicitors and informed a Miss Williams, the secretary dealing with the matter, that the purchasers would be able to complete the purchase on 17 August. Miss Williams responded that she thought that would be all right, but would have to get instructions. As a consequence of that assurance, the purchasers did not attempt to tender the purchase price before the notice of rescission expired. The relevant issue for the court was whether an estoppel arose which prevented the vendors from insisting on the deadline and thus treating the contract as rescinded on 11 August.

Gibbs CJ and Murphy J did not require a particular type of conduct on the part of the representor, but held that an estoppel would arise if it were established that Miss Williams, by saying she would get instructions, had induced the purchasers' solicitors to believe that the vendors' right to rescind the contract would be kept

[85] Ibid 104 (Lindley LJ); see similarly 106 (Bowen LJ) and 115 (Kay LJ).
[86] (1983) 152 CLR 406, 421 (Gibbs CJ and Murphy J).

in abeyance until instructions were obtained.[87] The threshold question for the establishment of the estoppel was not whether the representor had made a promise or a representation, but whether the representor's conduct had led the representee to believe that some right of the representor's would not be enforced. Gibbs CJ and Murphy J found that that such a belief had been induced by Miss Williams' conduct, and the purchasers had altered their position on the faith of that belief by failing to tender the purchase moneys, which were available on 9 August.[88] Accordingly, the vendors were estopped from treating the contract as rescinded.[89]

Although Mason and Deane JJ quoted liberally from the judgments of Dixon J in *Thompson v Palmer* and *Grundt v Great Boulder Pty Gold Mines Ltd*, the principle of promissory estoppel which they applied was not based on the 'induced assumptions' approach laid down by Dixon J in those cases. Instead, Mason and Deane JJ held that a promissory estoppel could only result from a clear representation made by the representor as to his or her future conduct.[90] They found that Miss Williams did not, by her words or conduct, make any clear and unequivocal representation to the effect that the purchasers could disregard the time fixed by the notice of rescission.[91] Accordingly, no estoppel arose against the vendors, despite the finding that the purchasers had acted to their detriment on the faith of Miss Williams' representation.[92] The fifth member of the Court, Brennan J, held that the vendors' solicitors had no actual or implied authority to vary the effect of the notice of intention to rescind, and thus could not extend the time for completion. Since the purchasers' solicitors must be taken to have known of the limit of Miss Williams' authority, no promise or

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[87] Ibid 421.
[88] Ibid 422.
[89] Ibid 423. Gibbs CJ and Murphy J did not name the type of estoppel which arose, but referred to the principles articulated by Lord Cairns LC in *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 39, 448 and Bowen LJ in *Birmingham and District Land Co v London and North Western Railway Co* (1888) 40 Ch D 268, 286, as developed in *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 and affirmed by the House of Lords in *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657 and by the Privy Council in *Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 3 All ER 556, 559.
[90] (1983) 152 CLR 406, 438.
[91] Ibid 440.
[92] Ibid 438.

representation that the time for completion was to be extended could be inferred from Miss Williams' conduct.[93] The finding that no estoppel arose thus commanded a majority.

The difference between the conclusions reached by the minority and majority judges in *Legione v Hateley* appears to be entirely attributable to the approaches taken. Mason and Deane JJ focussed on the conduct engaged in by the representor, and required a particular type of conduct, namely a clear and unequivocal representation.[94] Gibbs CJ and Murphy J, on the other hand, focussed on the effect of the representor's conduct on the representee and, accordingly, required only that the conduct of the representor had induced a belief in the representee. The difference between the two judgments is that the doctrine applied by Mason and Deane JJ appeared to one based on promise, in which the obligation arose from the promise itself. Such a doctrine must require an unequivocal promise. Gibbs CJ and Murphy J, on the other hand, appeared to be applying a doctrine of estoppel which was essentially concerned with the representee's reliance, rather than the representor's conduct.

Greig and Davis have also observed a philosophical difference between the two judgments.[95] They see the judgment of Mason and Deane JJ as exemplifying the philosophy of those who regard promissory estoppel as an extraordinary means of giving effect to promises made without consideration. On such a view it is necessary to require a higher standard of proof than is the case with a contractual promise, since the latter is supported by consideration. The judgment of Gibbs CJ and Murphy J, on the other hand, embodies the philosophy of judges and commentators who more readily accept promissory estoppel 'as a normal part of the law' and are, therefore, 'content to state its requirements in terms of what a reasonable person in the position of the promisee would understand from the words or conduct of the promisor.'[96] Greig and Davis suggest that the difference

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[93] Ibid 453-5.
[94] Although Brennan J did not discuss the requirements of an estoppel, the relevant inquiry he made was whether a promise or representation could be inferred, ibid 454.
[95] Greig and Davis, above n 36, 149-157.
[96] Ibid 149.

between the two approaches should be resolved in favour of the objective approach of Gibbs and Murphy JJ, 'based on the overriding concept of reasonable reliance.'[97]

Greig and Davis' interpretation of the philosophical divide in *Legione v Hateley* is consistent with the above analysis of the case in terms of a divergence between a promise-based, representor-sided approach and a reliance-based, representee-sided approach to the threshold requirement. As the above discussion shows, later decisions of the High Court have tended to favour the reliance-based approach advocated by Greig and Davis. If that approach had been favoured by the High Court in *Legione v Hateley* then, since the representor's conduct clearly induced a belief on the part of the representees, and the representees clearly relied on that assumption to their detriment, the crucial issue should have been whether it was reasonable for the representees to adopt and act upon the assumption as they did.

B. ***Induced Assumptions and Promises***

There are two distinct aspects to the induced assumption requirement. The first relates to the state of mind of the representee in adopting the relevant assumption, while the second relates to the role of the representor in inducing the adoption of the assumption. The induced assumption requirement is concerned with both the position of the representee and the responsibility of the representor for that position. To that extent, the threshold requirement could be said to be consistent with both a reliance basis and a conscience basis for the doctrine. The induced assumptions approach does, however, focus on the representee rather more than might otherwise be the case. Any doctrine of estoppel must require a particular threshold of conduct on the representor's side, and the requirement of an induced assumption is a relatively weak requirement in that regard, establishing a low threshold of conduct on the part of the representor to found an estoppel. A doctrine of estoppel which is principally concerned with the representor, whether promise-based or conscience-based, might establish a threshold which looks for a

[97] Ibid 155.

particular type of conduct on the part of the representor, requiring a representation or a promise as the foundation of the estoppel.

A useful comparison can be drawn in this regard between equitable estoppel in Australia, and the equivalent doctrine in the United States, in which a promise is required to establish liability. The United States doctrine of promissory estoppel is the equivalent of equitable estoppel in Australia, protecting reliance on assumptions relating to the future conduct of a representor. The principle of 'equitable estoppel' operating in the United States is essentially the same as common law estoppel in Australia. It is said that equitable estoppel can apply only in relation to representations of existing fact, and can only be raised defensively to prevent the representor from asserting contrary facts.[98]

What appears at first blush to be a significant difference between promissory estoppel in the United States and Australian equitable estoppel is that promissory estoppel in the United States must, as its name suggests, be based on a promise. Liability depends on the making of a promise which is, or may be,[99] gratuitous, in the sense that consideration which can properly be regarded as the price of the promise has not been given in return for the promise.[100] Section 90 of the Restatement of Contracts (2d) describes promissory estoppel as follows:

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[98] *Tiffany Inc v WMK Transit Mix Inc* 56 ALR 1028, 1224-5 (Arizona Court of Appeals, 1972) and *American Jurisprudence* (2nd ed, 1965), vol 28, 625 *ff*. It seems that, like Anglo-Australian common law estoppel, the US principle of equitable estoppel may at times be extended to apply to representations relating to existing legal rights, and the principle will then prevent the representor from asserting contrary rights.

[99] There have been suggestions that promissory estoppel is being relied on in the United States, in lieu of traditional contract theory, in cases where bargained for consideration has been given: DA Farber and JH Matheson, 'Beyond Promissory Estoppel: Contract Law and the Invisible Handshake' (1985) 52 *University of Chicago Law Review* 903, 908; PN Pham, 'The Waning of Promissory Estoppel' (1994) 79 *Cornell Law Review* 1263, 1267-8. That situation should not arise in Australia because a plaintiff who has enforceable contractual rights arising from a promise should not be regarded as suffering detriment as a result of their reliance on that promise. In *Lyndel Nominees Pty Ltd v Mobil Oil Australia Ltd* (1997) 37 IPR 599, however, Wilcox J considered whether the promise in question was enforceable on the basis of equitable estoppel (which it was not) before considering whether it was enforceable on the basis of contract (which it was).

[100] The bargain theory of consideration applied in the US is encapsulated in ss 17 and 71 of the Restatement of Contracts (2d).

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Section 2 of the second Restatement defines a promise as a 'manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.' Jay Feinman has observed that the US courts have in some cases adopted a flexible interpretation of the 'promise' requirement, which has allowed them to infer promises in cases in which no explicit promise has been made. [101] It is perhaps significant in this regard that the requirement of an 'undertaking', which appeared in the first Restatement, was abandoned in the second.[102] In other cases a strict approach has been taken, which requires a definite promise, rather than a mere representation or statement of intention. Michael Metzger and Michael Phillips advocate a liberal approach to the 'promise' requirement on the basis that it is the promisee's reliance, rather than the promise itself, that is fundamental.[103]

The fact that a promise is not required to establish liability in Australia indicates that the court's concern is not with the type of conduct engaged in by the representor, but with the impact that conduct has on the representee.[104] A promise is just one way in which a representor can induce a representee to

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[101] Jay Feinman, 'Promissory Estoppel and Judicial Method' (1984) 97 *Harvard Law Review* 678, 690-4

[102] John Searle, *Speech Acts: An Essay in the Philosophy of Language* (1969) has argued that the undertaking of an obligation to perform an act is the essential feature of a promise. Neil MacCormick, 'Voluntary Obligations and Normative Powers I' (1972) Supp Vol 46 *The Proceedings of the Aristotelian Society* 59, 62 and Adam Smith, *Lectures on Justice, Police, Revenue and Arms* (Edwin Cannan ed, 1896) 130-1, on the other hand, have suggested that the intention on the part of the speaker to induce reliance is the hallmark of a promise.

[103] Michael Metzger and Michael Phillips, 'The Emergence of Promissory Estoppel as an Independent Theory of Recovery' (1983) 35 *Rutgers Law Review* 472, 537-9.

[104] It is interesting to note, however, that Stanley Henderson, 'Promissory Estoppel and Traditional Contract Doctrine' (1969) 78 *Yale Law Journal* 343, 361 has justified the US requirement for a 'genuine promise' on a reliance basis, suggesting that 'promissory estoppel protects reasonable reliance, and ... reliance is only reasonable if it is induced by an actual

adopt an assumption as to the representee's legal rights or the future conduct of the representor. Such an assumption can also be induced by a course of conduct which indicates that the representor will act in a certain way or that the parties have certain rights,[105] a representation as to the representor's intention to act in a certain way or as to the existing legal rights of the parties,[106] or even silence in certain circumstances.[107]

As Hugh Collins has observed, it is difficult to judge whether there is any substantive difference between the US and Australian approaches, since promises can be implied from statements and other conduct.[108] The Australian doctrine does, however, appear to have a greater potential for application to a case of reckless or inadvertent conduct by a representor. Much of the US commentary appears to be based on the assumption that promissory estoppel will arise only in relation to promises deliberately made.[109] The Australian doctrine, on the other hand, appears to have the potential to catch careless conduct by a representor which leads a representee to assume the representor will act in a certain way, but which could not be regarded as conveying a promise or commitment by the representor to act in that way.

A promise is, therefore, just one of several different types of conduct on which an estoppel can be founded in Australia. Michael Metzger and Michael Phillips have suggested that, in the United States, 'estoppel's reliance component may eventually so come to dominate its "promissory" aspect as to render the latter nugatory.'[110] In Australia, it could be argued that the reliance aspect already so dominates the promise aspect. If the relatively low threshold of an induced assumption is all that is required to found an estoppel, then that suggests that the fundamental concern of the doctrines is elsewhere. The chapters to follow

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promise.'

[105] See, eg, *S & E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122 ALR 637.

[106] See, eg, *Verwayen* (1990) 170 CLR 394.

[107] See, eg, *Waltons Stores* (1988) 164 CLR 387.

[108] Hugh Collins, *The Law of Contract* (2nd ed, 1993) 71-2.

[109] As Feinman, above n 101, 687, has noted, 'the typical doctrinal formulation of promissory estoppel holds out as its paradigmatic case a clear promise manifesting a commitment to future action'.

[110] Above n 103, 537.

will show that the focus of both the common law and equitable doctrines appears to be on the detrimental reliance of the representee, rather than the representor's conduct.

Chapter 4

DETRIMENTAL RELIANCE

A feature of both common law and equitable estoppel in Australia is the requirement that a representee must rely on the relevant assumption, by acting or refraining from acting in such a way that the representee will suffer detriment if the representor is allowed to depart from that assumption. That requirement of detrimental reliance by the representee is a central element of both common law and equitable estoppel in Australia. This chapter will trace the development of the detrimental reliance requirement in the common law and equitable doctrines. It will reveal the importance of the requirement in the Australian doctrines, and the strictness with which it is applied in most cases. It will also emphasise the theoretical implications of the adoption of a strict detrimental reliance requirement, comparing different promise-based and conscience-based alternatives which have been proposed in England.

I. ENGLISH ORIGINS

A. *The Early Cases*

The need for a representee to change his or her position on the faith of a representation has long been a requirement of estoppel at common law and in equity. Although the language has been refined in modern times with the advent of the expression detrimental reliance, and even the drawing of distinctions between different types of detriment, the requirement has not fundamentally changed. The courts in the early cases at common law and in equity tended to be concerned with the question whether the representee had acted on the representation or had changed his or her position on the faith of the representation. Looking first at estoppel by representation of fact, the leading early cases at common law and in equity required a change of position. In *Pickard v Sears*, a case described as the first enunciation in England of estoppel

by representation as a distinct branch of estoppel,[1] the court held that the representee must be induced to 'act on that belief [which the representor has caused the representee to adopt], so as to alter his own previous position' before an estoppel will arise.[2] Similarly, in equity, an estoppel by representation of fact was said to arise where 'a representation is made to another person going to deal in a matter of interest upon the faith of that representation,'[3] and where the representee has 'acted on the faith of such representation.'[4]

It appears that a test of similar strictness was applied in those cases falling within equity's jurisdiction to make good representations of intention. Even in the 1378 case discussed by Ames, the modern requirement would have been satisfied. There, the plaintiff laid out money in travelling to London to consult counsel on the faith of the defendant's promise to convey land to him. The detriment incurred by the plaintiff in that case is similar to that suffered by the representee in *Re Neal*,[5] where the detriment consisted of the legal costs incurred by a debtor in making arrangements for a payment which the creditor represented would be accepted in satisfaction of the debtor's obligations. In the leading 19th century case of *Hammersley v De Biel*,[6] the court was concerned only with the question whether the plaintiff had 'acted on' the defendant's representation of an intention to make a gift. The more stringent modern tests would appear to have been satisfied, however, since the plaintiff acted on the faith of the relevant assumption by marrying, thereby incurring significant financial obligations according to the law and custom of the day.

By the end of the 19th century it was clear that both an alteration of position (including a failure to act)[7] on the faith of a representation,[8] and loss or

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[1] Lancelot Everest, *Everest and Strode's Law of Estoppel* (2nd ed, 1907) 325.
[2] (1837) 6 Ad & E 469; 112 ER 179,
[3] *Evans v Bicknell* (1801) 6 Ves 174; 31 ER 998, 1002.
[4] *West v Jones* (1851) 1 Sim (NS) 205; 61 ER 79, 81 (Lord Cranworth VC).
[5] *Re Neal; ex parte Neal v Duncan Properties Pty Ltd* (1993) 114 ALR 659.
[6] (1845) 12 Cl & F 45; 8 ER 1312.
[7] *McKenzie v British Linen Co* (1881) 6 App Cas 82, 91 (Lord Selborne LC).
[8] Cases in which estoppels failed on that ground before the turn of the century include *Howard v Hudson* (1853) 2 E & B 1; 118 ER 669 (Ct of Ex Chamber); *Carr v London and North*

prejudice resulting from that alteration of position,[9] were required to establish an estoppel at common law and in equity. It was clearly insufficient then, as it is today, merely to show that the representee has acted on the faith of the representation. The representee must show that he or she will suffer some harm as a result of taking such action if the representor is allowed to deny the truth of the representation, as the speech of Lord Robertson in *George Whitechurch Ltd v Cavanagh*[10] demonstrates. Lord Robertson held that no estoppel arose in that case because, although the representee had clearly altered his position in reliance on the representation, he did not establish that he had suffered detriment as a result. The case was concerned with a transfer of shares in the appellant company, made by way of security to the respondent. The respondent's case was that, on the faith of representations made on behalf of the appellant that he was getting a good transfer of shares, the respondent released the debtor from two forms of French legal process called, respectively, an 'opposition' and a 'saisie'. Nether of those forms of process, however, gave the respondent any priority over any other creditor. Accordingly, in Lord Robertson's view, no estoppel arose because it was not shown that the representee had lost money as a result of his actions 'which he would have got if he had not so acted'.[11]

B. *Proprietary Estoppel*

The requirement of detrimental reliance developed somewhat later in proprietary estoppel, no doubt as a result of confusion as to the juridical basis of the court's intervention in the early cases. That confusion is evident in the

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Western Railway Co (1875) LR 10 CP 307, 317 (Brett and Denman LJJ); *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188, 211 (Brett LJ); *Horsfall v Halifax & Huddersfield Union Banking Co* (1883) 52 LJ Ch 599, 602 (Pearson J). See further George Spencer Bower and Sir Alexander Turner, *The Law Relating to Estoppel by Representation* (3rd ed, 1977) 101-9.

[9] *Carr v London and North Western Railway Co* (1875) LR 10 CP 307, 317 (Brett and Denham JJ). Subsequently, in *Greenwood v Martin's Bank Ltd* [1933] AC 51, 57 Lord Tomlin said that an act or omission resulting from the representation and consequent detriment are essential factors giving rise to an estoppel.

[10] [1902] AC 117.

[11] Ibid 136.

approach taken by Lord Westbury LC in *Dillwyn v Llewelyn*.[12] The plaintiff's father offered him a farm so that the plaintiff could build a house on it and live near his father. The plaintiff accepted the offer, and the father signed a memorandum 'presenting' the farm to the plaintiff. The plaintiff then took possession of the farm and expended a large sum of money in building a house on it. The land was not effectively conveyed to the plaintiff and, on the father's death, passed under his will to others. The Master of the Rolls declared the plaintiff entitled to a life interest in the property. On appeal, the Lord Chancellor held that 'the son's expenditure on the faith of the memorandum supplied a valuable consideration and created a binding obligation' on the father to transfer the fee simple to the son in accordance with the memorandum.[13] The plaintiff's expenditure in *Dillwyn v Llewelyn* would clearly satisfy the modern detriment requirement. Uncertainty as to the basis of the court's intervention led Lord Westbury LC to describe the plaintiff's detriment as a 'consideration', perhaps using the term in the broad sense of a reason for enforcement of the promise.[14]

Unlike estoppel by representation, proprietary estoppel operated within a narrow factual scope, and consequently its elements did not need to be defined in abstract terms. It was confined in its operation to assumptions relating to interests in property, and the facts of the early cases were such that detriment was not an issue. In *Ramsden v Dyson*, for example, Lord Cranworth LC stipulated that the doctrine arose where 'a stranger builds on my land supposing it to be his',[15] while Lord Kingsdown's formulation required a person to lay out money upon the relevant land on the faith of the relevant promise or expectation.[16] The requirement was stated more broadly in *Willmott v Barber*,

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[12] (1862) 4 De GF & J 517; 45 ER 1285.
[13] Ibid 1287.
[14] As discussed in Chapter 1, Lord Westbury's characterisation of the plaintiff's expenditure as a 'valuable consideration' led some to believe that the plaintiff succeeded in *Dillwyn v Llewelyn* on the basis of contract, rather than an equity arising by way of estoppel, see, eg: *Beaton v McDivitt* (1985) 13 NSWLR 134 (Young J). That reading of *Dillwyn v Llewelyn* was rejected by the Court of Appeal in *Beaton v McDivitt*: (1987) 13 NSWLR 162, 170 (Kirby P), 182 (McHugh JA).
[15] (1866) LR 1 E & I App 129, 140.
[16] Ibid 170.

where Fry J held that 'the plaintiff must have expended some money or done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief'.[17] Notwithstanding the different forms in which the principle was stated, it is clear that the notion of expenditure on the faith of a promise or expectation of an interest in land is equivalent to the modern requirement of detrimental reliance, as Dunn LJ made clear in *Greasley v Cooke*: 'There is no doubt that for proprietary estoppel to arise the person claiming must have incurred expenditure or otherwise have prejudiced himself or acted to his detriment.'[18]

C. *Promissory Estoppel*

1. The Approach of the Courts

The position is somewhat different in the case of promissory estoppel. The two nineteenth century cases on which the modern principle was founded, *Hughes v Metropolitan Railway Co*[19] and *Birmingham & District Land Co v London & North-Western Railway Co*,[20] did not require detrimental reliance, although indirect references to a change of position can be found in the each case. In *Hughes*, the reference to a change of position may be found in the requirement that it must be inequitable for the representor to assert his or her legal rights before the relevant principle will operate. Lord Cairns LC required that, for the principle to operate, the course of negotiations between parties to a contract should lead one of them to suppose that certain rights involving a forfeiture will

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[17] (1880) 15 Ch D 96, 105.

[18] [1980] 1 WLR 1306, 1313-4. Cf the *dictum* of Lord Denning MR, ibid 1311-2, that it was not necessary for the representee in that case to prove that she acted to her detriment or to her prejudice, but was sufficient if she acted on the faith of the assurance in such circumstances that it would be unjust for the representor to go back on the assurance. PV Baker and PStJ Langan, *Snell's Equity* (29th ed, 1990) 574, fn 74, suggest that Lord Denning's *dictum* should be confined to disputing that expenditure on the faith of the representation is essential. More recently, in *Sledmore v Dalby* (1996) 72 P & CR 196, 207, Hobhouse LJ suggested that the detriment suffered by a representee must be 'distinct and substantial' before a proprietary estoppel will be made out. Lord Denning's suggestion that detriment is not required has been somewhat more influential in the promissory estoppel cases, see below, text accompanying nn 26-40.

[19] (1877) 2 App Cas 439 ('*Hughes*').

[20] (1888) 40 Ch D 268 ('*Birmingham*').

not be enforced. A court of equity would then prevent those rights from being enforced.[21] He did not require that the representee should have acted on the faith of that belief, but held that the representor would not be allowed to enforce the rights in question 'where it would be inequitable having regard to the dealings which have thus taken place between the parties.'[22] There was no intimation in the judgment as to the particular factors which Lord Cairns saw as rendering it inequitable for the representor to enforce his or her rights. As will be discussed below, the requirement that it must be 'inequitable' to enforce rights before a promissory estoppel will arise has more recently been interpreted as incorporating a change of position requirement. The principle laid down in *Hughes* was applied by the High Court of Australia in *Barns v Queensland National Bank Ltd*, apparently on the basis that the representee had established that he had acted or refrained from acting on the faith of the arrangement made with the representor.[23]

In *Birmingham*, Bowen LJ broadened the *Hughes* principle beyond cases of forfeiture. According to Bowen LJ, the principle operated where persons having contractual rights induced those against whom they had those rights to believe that they would not be enforced. Interestingly, however, Bowen LJ held that a court of equity would not allow the representor to enforce the rights in question, '*without at all events placing the parties in the same position as they were before.*'[24] Presumably, therefore, if a representee had not altered his or her position on the faith of his or her belief that the rights in question would not be enforced, the representor would be free to enforce his or her strict legal rights. Viscount Simonds in *Tool Metal Manufacturing Co Ltd v Tungsten Electrical Co Ltd* emphasised the importance of those last words of Bowen LJ because, he said, 'the gist of the equity lies in the fact that one party has by his conduct led the other to alter his position.'[25]

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[21] (1877) 2 App Cas 439, 447.
[22] Ibid.
[23] (1906) 3 CLR 925, 939. The doctrinal basis of the decision was not made clear by the Court, on the footing that it did not matter whether the representation was enforced on the basis of estoppel by representation or as a contract for valuable consideration: ibid 940.
[24] (1888) 40 Ch D 268, 286 (emphasis added).
[25] [1955] 1 WLR 761, 763-4. The importance of the words in question was also emphasised by

If the judgments of Lord Cairns and Bowen LJ can be interpreted to require a change of position before the principle can be invoked, such a requirement was clearly not adopted by Denning J in his formulation of the principle of promissory estoppel in *Central London Property Trust v High Trees House*[26] and subsequent cases. In that case, Denning J articulated the principle that a promise is binding if 'intended to be binding, intended to be acted upon and *in fact acted upon*'.[27] Lord Denning reiterated the principle in essentially that form in a number of subsequent decisions in the Queens Bench Division of the High Court[28] and in the Court of Appeal.[29] In *WJ Alan & Co v El Nasr Export and Import Co*,[30] Lord Denning explicitly distinguished between the requirement of acting on the faith of the relevant promise or assurance and the requirement of detriment, holding the former to be all that was required to establish a promissory estoppel.

The case was concerned with the currency of payment under a contract for the sale of coffee. Although the agreed price was denominated in Kenyan shillings, the buyers set up a confirmed letter of credit in pounds sterling, the Kenyan shilling and the sterling shilling at that time being of equal value. That letter of credit was accepted by the Kenyan sellers, who in due course submitted invoices expressed in sterling and were paid in sterling under the credit. Before the sellers presented the final invoice, sterling was devalued. The sellers claimed that the currency of account was Kenyan shillings, and that they were

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White J in *Je Maintiendrai Pty Ltd v Quaglia* (1980) 26 SASR 101, 110-111, who noted that the suggestion that there must be some restoration of the altered position before the promisor will be allowed to go back on his promise suggests in turn that there has been some suffering of detriment by the promisee.

[26] [1947] 1 KB 130.

[27] Ibid 136. Although it is not clear from the passage quoted, the principle applied only in relation to a promise not to enforce existing legal rights and could only be relied upon defensively, to prevent the promisor from acting in a manner inconsistent with the promise (ibid 134).

[28] *Foot Clinics (1943) Ltd v Cooper's Gowns Ltd* [1947] 1 KB 506, 510-11; *Robertson v Minister of Pensions* [1949] 1 KB 227, 230.

[29] *Charles Rickards Ltd v Oppenhaim* [1950] 1 KB 616, 623; *Combe v Combe* [1951] 2 KB 215, 220; *Plasticmoda Societa Per Azione v Davidsons (Manchester) Ltd* [1952] 1 Lloyd's Rep 527, 539; *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, 213; *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* [1974] 3 All ER 575, 580; *Brikom Investments Ltd v Carr* [1979] 2 All ER 753, 758.

entitled to payment of an additional amount sufficient to bring the price up to the agreed price in Kenyan shillings. That claim was accepted by the trial judge, Orr J, who rejected the buyers' claim that the sellers had lost their right to be paid in Kenyan shillings. Orr J held that a promissory estoppel was not established because there was no evidence of any representation by the sellers, and no evidence that the buyers had acted to their detriment in reliance on any such representation.[31]

The Court of Appeal, by majority, overturned Justice Orr's decision, on the basis that the sellers had waived their right to payment in Kenyan shillings. Lord Denning MR appeared to regard waiver as a part of the principle of promissory estoppel.[32] Referring to the trial judge's rejection of the *High Trees* doctrine on the basis that there was no evidence of detriment, Lord Denning said that he could find no support in the authorities cited by the trial judge that there must be a detriment. All that was required, he said, was that 'one should have "*acted* on the belief induced by the other party."'[33] Lord Denning MR held, therefore, that by accepting a letter of credit denominated in pounds sterling the sellers had waived their right to payment in Kenyan currency.[34]
Megaw LJ also found that the buyers were entitled to rely on the principle stated by Lord Cairns LC in *Hughes*, but preferred not to formulate the nature of that principle.[35] Stephenson LJ agreed that the appeal should succeed on the ground of 'waiver or variation', but chose to leave open the question whether detriment was required. He said that the buyers in this case had acted to their detriment on the seller's waiver, although he did not specify what constituted that detriment.[36] It is, with respect, difficult to see what detriment had been

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[30] [1972] 2 QB 189.
[31] Ibid 193.
[32] Ibid 212 (citations omitted):

> It is an instance of the general principle which was first enunciated by Lord Cairns LC in *Hughes v Metropolitan Railway Co* and rescued from oblivion by *Central London Property Trust Ltd v High Trees House Ltd.* The principle is much wider than waiver itself: but waiver is a good instance of its application.

[33] Ibid 213-4, quoting *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 1 WLR 761, 799 (Lord Cohen).
[34] [1972] 2 QB 189, 214.
[35] Ibid 218.
[36] Ibid 221.

suffered by the buyers. The only detriment they could claim to have suffered was the cost of setting up the sterling credit, but any such cost was incurred before the sellers represented that they would accept payment in that form, and was not suffered as a result of reliance on that representation.[37] Accordingly, the Court of Appeal's decision appears to stand as authority for the proposition that detriment is not required to establish a promissory estoppel in England.[38]

Stronger requirements have, however, been applied in subsequent cases. The Privy Council in *Ajayi v RT Briscoe (Nigeria) Ltd* stipulated that the representee must have 'altered his position' on the faith of the faith of the promise.[39] In the Court of Appeal in *James v Heim Gallery (London) Ltd*, Buckley LJ held that the representee must have altered his or her position to his or her disadvantage, while Oliver J held that a representee must 'alter his position in reliance upon the representation' in such a way that it would be inequitable to permit the representor to depart from it.[40]

2. Commentators' Interpretations

Lord Denning has, in his extra-judicial writings, sought to draw a distinction between deliberate promises that one's legal rights will not be enforced and conduct which induces another party to adopt an assumption that one's legal rights will not be enforced.[41] The approach articulated by Lord Denning makes it clear that he regarded detriment as unnecessary in the case of a deliberate

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[37] Malcolm Clarke, 'Bankers' Commercial Credits Among the High Trees' (1974) 33 *Cambridge Law Journal* 260, 286-7, has suggested that, in reliance on the sellers' acceptance of the credit, the buyers lost the opportunity to acquire substitute goods, and thereby exposed themselves to a breach of a contract to on-sell the goods. But since the sellers did not terminate the contract for the buyers' breach in relation to the credit, but delivered the goods in accordance with the contract, no such detriment would have been suffered as a result of the sellers' enforcement of their legal right to payment in Kenyan currency. The detriment must be assessed at the time the representor seeks or attempts to resile from the assumption: *Je Maintiendrai Pty Ltd v Quaglia* (1980) 26 SASR 101, 114 (White J), 117 (Cox J).

[38] In his subsequent judgment in *Brikom v Carr* [1979] 2 All ER 753, 758, Lord Denning observed that suggestions that a party must have altered his position on the faith of a promise or representation, meaning that he must have acted differently from what he would otherwise have done, gives too limited a scope to the principle of promissory estoppel.

[39] [1964] 3 All ER 556, 559.

[40] (1980) 256 EG 819, 821 (Buckley LJ), 825 (Oliver LJ).

[41] AT Denning, 'Recent Developments in the Doctrine of Consideration' (1952) 15 *Modern*

promise. That is because the requirement of an intention to affect the parties' legal relations stands as a substitute for detriment in what is an essentially contractual source of rights. In the case of a promise not to enforce certain legal rights, which promise is intended to affect the parties' legal relations and to be acted upon by the promisee, Lord Denning suggested that detriment is not required:

> In those cases the promise is binding as soon as the other party has acted on it, and the only question then that can arise is as to the true interpretation of the promise. These cases seem to fall more naturally under the law of contract, rather than the law of estoppel.[42]

Lord Denning distinguished between those cases and cases in which there was no promise, but only conduct by a representor which has led a representee reasonably to believe that the representor will not enforce his or her strict legal rights against the representee. In that latter category of case an intention to affect the parties' legal relations is not required, and the right of the representor to insist on his or her legal rights is lost only if the representee has acted to his or her prejudice. Lord Denning thought those cases were best characterised as cases of estoppel.[43]

Lord Denning conceded that the distinction he sought to draw had not up to that time been drawn in the cases, and more recent cases do not show any signs of adopting it. Nevertheless, Lord Denning's analysis is interesting because it clearly articulates two notions which appear to emerge from his judgments. First, that he sees an 'intention to affect legal relations' requirement as an alternative to detrimental reliance in the case of promissory estoppel. Secondly, that he sees promissory estoppel as based on the promisor's intention and, therefore, as an essentially contractual source of obligation. Being ultimately based on intention, that source of obligation can be distinguished from

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Law Review 1.
[42] Ibid 9.
[43] Ibid.

obligations arising from estoppel proper, which are founded on the representee's reliance.

Although Lord Denning's approach does not represent the law in Australia, it is important in the current discussion to bear in mind the notion that an intention to create legal relations requirement could be regarded as an alternative to detrimental reliance, particularly if one sees promissory estoppel as an essentially contractual form of obligation based on the enforcement of promises. This distinction will be raised again in Chapter 6, in the context of the unconscionability requirement, in response to suggestions that an 'intention to affect legal relations' is one of the requirements of equitable estoppel in Australia.

Like Lord Denning, Gunter Treitel has also placed great emphasis on the fact that detriment is not required to found a promissory estoppel. He sees it as a factor which, along with the fact that promissory estoppel suspends, rather than extinguishes rights, distinguishes promissory estoppel from the common law principle of estoppel by representation.[44] It is arguable, however, that detriment is required to establish a promissory estoppel, the notion being hidden in the requirement that it must be 'inequitable' for the promisor to go back on the promise before a court of equity will prevent the rights in question from being enforced. Treitel suggests that it is 'inequitable' to resile from a promise where the promisee has acted in reliance on it so that he cannot be restored to the position he was in before he took such action.[45]

Mark Lunney has suggested that the distinction drawn by Treitel appears to be a distinction without a difference.[46] The issue is whether a valid distinction can be drawn between the concept of detrimental reliance and the concept of

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[44] GH Treitel, *The Law of Contract* (9th ed, 1995) 109-10.
[45] Ibid. Cf Lord Denning's statement in *D & C Builders Ltd v Rees* [1965] 2 QB 617, 625, that it would be inequitable for the creditor in that case to insist upon his legal right to recover a debt where there has been a true accord which the debtor acts upon by paying a lesser sum in satisfaction.
[46] Mark Lunney, 'Towards a Unified Estoppel—The Long and Winding Road' [1992] *The Conveyancer and Property Lawyer* 239, 243.

irrevocably altering one's position on the faith of a promise in such a way that it would be inequitable to resile from that promise.[47] While it is possible to envisage non-detrimental changes of position on the faith of promises,[48] it is difficult to see how it could be regarded as inequitable to depart from a promise unless the change of position on the faith of that promise was detrimental.[49] Certainly it will not be so if the irrevocable change of position was clearly favourable.[50] For the purposes of English promissory estoppel, therefore, it may be that it will be inequitable for a promisor to resile from a promise only when the promisee has acted on the promise to his or her detriment. Thus, it may be that detriment, albeit by another name, is required to establish a promissory estoppel as well as a common law and proprietary estoppel in England.[51]

II. DETRIMENTAL RELIANCE IN AUSTRALIA

The greater unity recognised in Australia between the various estoppels is at least partly attributable to a more consistent approach to the detriment

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[47] Spencer Bower and Turner, above n 8, 111 suggest that the test of detriment for the purposes of common law estoppel 'is whether it appears unjust or inequitable that the representor should now be allowed to resile from his representation, having regard to what the representee has done, or refrained from doing, in reliance on that representation.'

[48] An example is provided by the case of *George Whitechurch Ltd v Cavanagh* [1902] AC 117, discussed above, text accompanying nn 10-11. The representee in that case failed to make out an estoppel where he had, on the faith of the relevant assumption, released certain forms of French legal process which did not give him any priority over other creditors. It is significant that that the representee's position was not *irrevocably* changed by his actions.

[49] Cf the statement of Lord Denning in *D & C Builders Ltd v Rees* [1965] 2 QB 617, 625, above n 45 and that of Robert Goff J in *Societe Italo-Belge Pour Le Commerce Et L'Industrie v Palm and Vegetable Oils (Malaysia) Sdn Bhd (The "Post Chaser")* [1981] 2 Lloyd's Rep 695, 701. In order to illustrate the difference between merely acting on a representation and detrimentally relying on it, KE Lindgren and KG Nicholson, 'Promissory Estoppel in Australia' (1984) 58 *Australian Law Journal* 249, 157 cite the example of a purchaser of land who is unable to complete by the agreed settlement date. The purchaser is promised an extension of time by the vendor and, in reliance on that promise, sells another property to fund the purchase. If the vendor then rescinds the contract before the agreed extension expires, Lindgren and Nicholson suggest, the purchaser has suffered a change of position which is not sufficiently detrimental to establish an estoppel. Since the purchaser cannot resume his or her original position, however, the courts might well regard the change of position as detrimental. Cf the suggestion of Spencer Bower and Turner, above n 8, 104 that the detriment required to establish an estoppel must consist of 'actual or temporal damage,—some loss of money or money's worth, which admits of quantification and assessment.'

[50] Baker and Langan, above n 18, 571, n 35: 'an equity could hardly be raised by a man altering his position to his *advantage*.'

[51] As discussed above, however, the decision of the English Court of Appeal in *WJ Alan & Co v El Nasr Export and Import Co* [1972] 2 QB 189 appears to stand as authority for the contrary proposition: that detriment is *not* required to establish a promissory estoppel.

requirement. The modern formulation of the detrimental reliance requirement in Australia emerged from the judgments of Dixon J in *Thompson v Palmer*[52] and *Grundt v Great Boulder Pty Gold Mines Ltd*,[53] and has since been applied in forms of estoppel by conduct at common law and in equity. The origin of the Australian courts' emphasis on detrimental reliance is in the joint judgment of the High Court in *Craine v Colonial Mutual Fire Insurance Co Ltd.*[54] In that case the High Court quoted Lord Shand's statement in *Sarat Chunder Dey v Gopal Chunder Laha*, that the foundation of estoppel is the injustice in allowing a person to deny or repudiate a former statement to the loss and injury of a person who has acted on it.[55]

The failure of a representee to fulfil the detrimental reliance requirement formed the basis of the High Court's rejection of a plea of estoppel in *Thompson v Palmer*. The question before the court in *Thompson v Palmer* was whether the vendor of certain mortgages could assert a vendor's lien over the mortgages for the unpaid purchase price. Whether such a lien could be asserted depended on a question of estoppel: whether the vendor was estopped from denying receipt of the purchase price from the purchaser. Both the vendor and purchaser had invested money through a rogue solicitor, Clegg, and the transfer of the mortgages arose out of Clegg's attempts to cover up his misappropriation of much of the money invested through him. The purchaser expected that the purchase price of the mortgages would be paid from moneys owed to her by Clegg. The purchaser was able to establish that, as a result of representations made by the vendor, she was led to believe that the vendor's claims in relation to the sale had been satisfied by Clegg.[56] The court held, however, that the purchaser had failed to establish that she had acted to her detriment in reliance on that belief. Some of the justices were prepared to accept that the purchaser remained inactive in reliance on the assumption that the vendor's claim was

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[52] (1933) 49 CLR 507, 547: 'in each case [the representee] is not bound to adhere to the assumption unless, as a result of adopting it as the basis of action or inaction, the other party will have placed himself in a position of material disadvantage if departure from the assumption be permitted.'
[53] (1937) 59 CLR 641 ('*Grundt*').
[54] (1920) 28 CLR 305, 327 (Isaacs J, delivering the judgment of the court).
[55] (1892) 19 LR Ind App 203, 215-6.

satisfied. Since Clegg was insolvent, however, the purchaser could not establish that she could have done anything to improve her position had she not been put to sleep.[57] Dixon J said that the 'very foundation of the estoppel is the change of position to the prejudice of the party relying upon it, and I think the burden of proving the issue must lie upon him.'[58]

Dixon J reiterated the importance of detrimental reliance in his judgment in *Grundt*, holding that, in establishing an estoppel *in pais*, it is an indispensable condition that the representee must have acted or refrained from acting on the basis of the assumed state of affairs, so that he or she would suffer a detriment if the representor were allowed to set up rights inconsistent with that assumption.[59] That famous statement has since come to dominate the approach taken by the Australian courts in relation to both common law and equitable estoppel. In the common law estoppel case of *Newbon v City Mutual Life Assurance Society Ltd*, Rich, Dixon and Evatt JJ explained that what makes it unjust to depart from an assumption one has induced is that if such departure were permitted 'the party so induced would through making the assumption find himself in a position occasioning material detriment to himself. Without this element there is no estoppel.'[60]

Consistent with the approach of the English courts,[61] the Australian courts have accepted and applied a strict requirement of detrimental reliance in proprietary estoppel cases. An early example was *Donaldson v Freeson*,[62] in which the High Court overturned a decision of the Full Court of the New South Wales Supreme Court that a proprietary estoppel arose on the facts. The High Court

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[56] (1933) 49 CLR 507, 520-1 (Rich J), 548 (Dixon J). Cf 527 (Starke J) and 559 (McTiernan J).
[57] Ibid 521 (Rich J), 527-8 (Starke J), 548-9 (Dixon J), 559 (McTiernan); cf 553 (Evatt J).
[58] Ibid 549.
[59] (1937) 59 CLR 641, 674. It was clear from Justice Dixon's judgment that the words 'acting on the footing of' an assumption were intended to convey the notion of reliance on the assumption.
[60] (1935) 52 CLR 723, 734-5. It was clear from the judgment that the words 'through making the assumption' were intended to convey the notion of reliance.
[61] Leaving to one side the aberrant approach of Lord Denning, discussed above, n 18.
[62] (1934) 51 CLR 598.

found that no proprietary estoppel arose because no detriment had been suffered as a result of the denial of the relevant assumption.[63]

The strict detriment requirement laid down by Dixon J in *Thompson v Palmer* and *Grundt* was also applied in early promissory estoppel cases in South Australia and Queensland. In *Je Maintiendrai Pty Ltd v Quaglia*,[64] the Full Court of the Supreme Court of South Australia applied the requirement strictly, although members of the court differed on the question whether it was satisfied on the facts. The issue on appeal was whether an estoppel arose from a landlord's gratuitous promise to accept a reduced amount of rent from the tenants. The tenants rented a shop in the landlord's shopping centre from which they conducted a hairdressing business. The landlord agreed to a rent reduction because of financial difficulties faced by the tenants, and because the landlord was experiencing difficulties in filling vacant shops in the shopping centre. The landlord accepted the reduced rent for a period of eighteen months, until the tenants sought to leave the premises, at which time the landlord demanded the amount unpaid.

The Full Court upheld the decision of the court below that a promissory estoppel arose which prevented the landlord from claiming the unpaid portion of the rent. The court held unanimously that, contrary to the opinion expressed by Lord Denning in *WJ Alan Ltd v El Nasr Export and Import Co*,[65] a promissory estoppel could only arise if the promisor had altered his or her position on the faith of the promise and would thereby suffer detriment if the promisor was subsequently allowed to assert his or her strict legal rights.[66] King CJ and White J relied on the approach taken by Dixon J in *Grundt*, on the basis that promissory estoppel rests on the same basic principle as estoppel *in pais*.[67] While acknowledging that the evidence as to detriment was sparse, King CJ and White J accepted the finding of the trial judge that, in view of their

[63] Ibid 610 (Gavan Duffy CJ and Starke J).
[64] (1980) 26 SASR 101 ('*Je Maintindrai*').
[65] [1972] 2 QB 189, 213.
[66] (1980) 26 SASR 101, 105-6 (King CJ), 113-5 (White J), 117 (Cox J).
[67] Ibid 106 (King CJ), 113-5 (White J).

financial position, it would be a detriment to the tenants to be forced to pay the arrears in a lump sum.[68] Cox J dissented on the basis that, although it was possible to speculate about detriment the tenants might have suffered, the tenants had not discharged the burden of establishing affirmatively that they had acted to their detriment on the faith of the assumption.[69]

The decision of the majority in *Je Maintiendrai* was based on the notion that the detriment suffered by a representee must be assessed at the time the representor seeks to resile from the relevant assumption.[70] That important principle was crucial to the outcome in *Je Maintiendrai* because, until the landlord attempted to resile from the assumption that the full rent was not payable, the tenants actually obtained a benefit in paying a reduced amount of rent. That benefit would have become a detriment had the landlord been able to claim the unpaid amount, however, because it was clearly easier for impecunious persons such as the tenants to make small periodical payments rather than a lump sum.[71] Presumably no estoppel would have arisen had the tenant been a wealthy person for whom payment of the unpaid rent in a lump sum would have presented no difficulty. That is, unless the wealthy tenant had, on the faith of the rent reduction, incurred expenditure which would not otherwise have been incurred.[72]

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[68] Ibid 107 (King CJ), 115-6 (White J).

[69] Ibid 120-1.

[70] White J, ibid 114-5, quoted the following statement of principle from Spencer Bower and Turner, above n 8, 110, which he observed was in line with Justice Dixon's analysis in *Grundt*:

> But it is of the utmost importance to notice that the 'detriment' which the representee must be shown to have suffered is judged only *at the moment when the representor proposes to resile from his representation.* So long as the assumption continues to be regarded by the parties as true, the question of estoppel does not arise. It is only when the representor wishes to disavow the assumption contained in his representation that an estoppel arises ...

The proposition was also articulated by Cox J: (1980) 26 SASR 101, 117. The principle is not always borne in mind when detriment is being assessed, see *Re Ferdinando; ex parte Australia and New Zealand Banking Group Ltd v Official Trustee in Bankruptcy* (1993) 42 FCR 243 and the discussion of that case in Andrew Robertson, 'Limits on the Recovery of Secured Debts: Estoppel and Section 52' (1994) 5 *Journal of Banking and Finance Law and Practice* 211.

[71] (1980) 26 SASR 101, 106-7 (King CJ). As King CJ noted, the case would have been more satisfactory from an evidentiary point of view had the tenants provided clear evidence of their financial difficulties or evidence that the money had been spent in other ways. There was some evidence of the tenants' financial difficulties, however, and King J noted that the trial judge was in a better position to assess the financial position of the tenants and to judge the effect of the accumulation of arrears on them: ibid 107.

[72] The potential detriment to a tenant who receives a gratuitous rent reduction is analogous to

The model of promissory estoppel applied by the Full Court of the South Australian Supreme Courts in *Je Maintiendrai* was essentially the same as that adopted by the Full Court of the Queensland Supreme Court in a decision handed down at approximately the same time.[73] Those judgments foreshadowed the approach which was to be adopted by the High Court. In *Legione v Hateley*,[74] the element of detriment was not emphasised by the two members of the Court who held that a promissory estoppel arose. The estoppel arose, according to Gibbs CJ and Murphy J, because, after receiving an assurance that the time for completion would be extended, the inaction of the purchasers had altered their position, rendering it inequitable to allow the vendors to treat the contract as rescinded.[75] The purchasers' inaction altered their position because they lost the right to tender the purchase price within the time fixed by the notice for completion.[76] Mason and Deane JJ articulated the requirement of detrimental reliance more clearly, and held that the rule formulated by Dixon J in *Thompson v Palmer* and *Grundt* was applicable to a doctrine of promissory estoppel.[77] Despite the unsatisfactory evidence on the question, Mason and Deane JJ also found that the requirement was satisfied on the facts, since the purchasers relied on the representation in failing to arrange a settlement within the time required.[78] As discussed in Chapter 3, however, Mason and Deane JJ held that no estoppel arose because no clear representation

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that which can be suffered by a payee who receives money to which they are not entitled, as in *Avon County Council v Howlett* [1983] 1 All ER 1073. As discussed in Chapter 1, part of the detriment suffered by the representee in *Avon County Council v Howlett* was caused by incurring expenditure which he would not otherwise have incurred, such as the purchase of clothes and the hire purchase of a motor car.

[73] In *Gollin & Co Ltd v Consolidated Fertilizer Sales Pty Ltd* [1982] Qd R 435 the Full Court of the Supreme Court of Queensland also approved a strict requirement of detrimental reliance in promissory estoppel. Those members of the court who decided the case on the basis of estoppel, WB Campbell and Andrews JJ, preferred the stricter approach articulated by Dixon J in *Grundt* to that advocated by Lord Denning in relation to promissory estoppel: ibid 448-55. It was not strictly necessary to decide whether detriment was required, however, because the Full Court upheld the decision of trial judge that the plaintiff had failed to establish that it had altered its position in reliance on any conduct of, or promise made by, the representor: ibid 457.

[74] (1983) 152 CLR 406.

[75] Ibid 422-3.

[76] Ibid 415 & 422.

[77] Ibid 437.

[78] Ibid 438.

had been made on behalf of the vendors that the time for completion would be extended.[79]

The element of detrimental reliance was emphasised more strongly by the High Court in its subsequent decision in *Waltons Stores (Interstate) Ltd v Maher.*[80] Mason CJ and Wilson J observed that in a case of promissory estoppel the elements of reliance and detriment attract equitable intervention on the basis that it is unconscionable to depart from a promise where doing so would result in detriment to the promisee.[81] The common thread which links together the doctrines of promissory and proprietary estoppel was said to be the principle that equity will come to the relief of a plaintiff who has acted to his or her detriment on the basis of an assumption induced by the defendant's conduct.[82]

The detriment element was also emphasised by Brennan J, who held that a plaintiff must prove that he or she has acted or abstained from acting in reliance on the assumption or expectation induced by the defendant, which action will occasion detriment if the assumption or expectation is not fulfilled.[83] Deane J also regarded it as necessary to establish an estoppel by conduct that the representee has acted to his or her detriment.[84] On the facts, the court unanimously held that the Mahers had suffered detriment on the faith of the assumption that Waltons had entered or would enter into the lease.[85] That detriment resulted from the costly building work undertaken by the Mahers in partly demolishing an existing building on their land and commencing the construction of a building designed specifically for use by Waltons.

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[79] Ibid 440.
[80] (1988) 164 CLR 387.
[81] Ibid 401. NC Seddon and MP Ellinghaus *Cheshire and Fifoot's Law of Contract* (7th Aust ed, 1997) 59 see some importance in the link between detrimental reliance and unconscionability. They suggest that 'in that reliance is to be found the inequity (or unconscionability) which moves a court to prevent the promisor from reneging on the promise or assurance.' No doubt reliance by another party on one's conduct is essential to make resiling from an assumption induced by that conduct actionable. Analysis of the detrimental reliance requirement is not, however, greatly illuminated by invoking the concept of unconscionability. As will be argued in Chapter 6, it is the representor's *knowledge* of the representee's detrimental reliance that is central to the question of unconscionability.
[82] (1988) 164 CLR 387, 404.
[83] Ibid 428-9.
[84] Ibid 446.

The leading authority on the question of detrimental reliance in Australia is the decision of the High Court in *Commonwealth v Verwayen*.[86] Like *Je Maintiendrai Pty Ltd v Quaglia*, it was a case in which evidence of detriment before the court was scarce and, accordingly, the nature of the requirement came under close scrutiny. One of the central issues before the court was whether Verwayen had acted on the faith of the Commonwealth's assurance that it would not plead the relevant defences, such that he would suffer detriment if those defences were relied upon. Mason CJ held that the unified doctrine of estoppel allows a court of common law or equity to do what is required to prevent a person from suffering detriment as a result of reliance on an assumption which another party has induced him to hold.[87] Accordingly, in order to invoke that doctrine, Verwayen was required to establish that he would suffer detriment in reliance on the assumption if the Commonwealth were to depart from it.[88]

Mason CJ identified two different types of detriment which might be suffered by a person seeking to establish an estoppel. First, there is detriment 'in the broad sense', which results from the denial of the correctness of the relevant assumption. Secondly, there is detriment 'in the narrow sense', which a representee suffers as a result of his or her reliance on the assumption. In the nomenclature of Fuller and Perdue,[89] detriment in the broad sense is expectation loss, and detriment in the narrow sense is reliance loss. Mason CJ said that detriment in the broad sense is required to found an estoppel, but the relief by which the court gives effect to the estoppel will be closer in scope to

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[85] Ibid 407 (Mason CJ and Wilson J), 429-30 (Brennan J), 446 (Deane J), 464 (Gaudron J).
[86] (1990) 170 CLR 394 ('*Verwayen*').
[87] Ibid 413.
[88] It is important to note that neither the common law nor the equitable doctrine requires that detriment has actually been suffered by the representee: the prospect of detriment is sufficient in each case. The notion of prospective detriment is particularly important in a case where the representor has not yet departed from the assumption in question, but has simply threatened to do so. As Ormiston J explained in *Commonwealth v Clark* [1994] 2 VR 333, 369-81, unless the representor has actually departed from the assumption, the representee will not have suffered any detriment. Accordingly, the relevant question in most cases is whether the representee *will* or *would* suffer detriment if the representor were allowed to do so.
[89] LL Fuller and William Perdue, 'The Reliance Interest in Contract Damages: 1' (1936) 46

the detriment suffered in the narrow sense.[90] With respect, it is difficult to see how detriment in the wide sense, or the loss of an expectation, is relevant to estoppel at all.[91] As this chapter has shown, it is detriment resulting from the representee's change of position, or reliance loss, which is required to found an estoppel, and it is the same detriment which shapes the remedy in the case of the equitable doctrine.[92]

Unfortunately, the concept of detriment in the broad sense has caused some confusion in subsequent cases, where it has been assumed that the loss of an expectation is sufficient detriment to establish an estoppel. The concept was applied by Wright J in *Blazely v Whiley*, a case in which the representor led his nephew and his nephew's wife to believe that he would sell a house to them for a modest price.[93] Referring to the two dimensions of detriment identified by Mason CJ, Wright J observed that in the broad sense the detriment suffered by the representees included the deprivation of the opportunity to purchase the house at considerably less than market value.[94] Such a loss is, with respect, simply the loss of an expectation and is not a detriment which is relevant to the establishment of an estoppel.[95] Detriment in that sense is suffered every time a promisor breaches a gratuitous promise to confer a valuable benefit on the promisee, whether it is a promise to make a gift, or a promise not to enforce rights against the promisee.

Similarly, in *W v G*, Hodgson J made the following remarks about the detriment question:

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[90] (1990) 170 CLR 394, 415-6. The suggestion that detriment in the broad sense is enough to establish an estoppel does not sit comfortably with Chief Justice Mason's own judgment with Wilson J in *Waltons Stores* (1988) 164 CLR 387, 400-8, which seemed to require detriment in the narrow sense to establish an equitable estoppel.

[91] Lunney, above n 46, 246-7, has also queried the helpfulness of the distinction between detriment in the broad sense and detriment in the narrow sense.

[92] See Chapter 7.

[93] (1995) 5 Tas R 254.

[94] Ibid 275.

[95] It should be noted that Wright J identified several other types of detriment suffered by the representees which did result from their reliance on the relevant assumption and which may, on

> On the question of detriment, I do not believe that it is necessary in this case to find that the plaintiff is worse off having had the children than she would have been if she had not had them, all things considered, thereby raising both difficult public policy issues as well as difficult issues of balancing benefits and detriments. In my opinion, it is sufficient that the plaintiff is now faced with the expensive and onerous task of bringing up two children on her own, as a result of her reliance on an assumption encouraged by the defendant, *whereas if the defendant had acted in accordance with that assumption, the plaintiff would have had the defendant's assistance in that task.* In my opinion, that is a sufficient detriment.[96]

Again, with respect, the detriment relied upon was simply the loss of an expectation, in this case the assistance promised by the defendant, which is not a sufficient detriment to establish an estoppel. It was necessary for Hodgson J in that case to address the difficult policy issue as to whether bearing and raising children could be considered a detriment, because that was the only detriment suffered by the representee as a result of her reliance on the relevant assumption. The need to focus on detriment in the narrow sense was made clear by Brennan J in *Verwayen*. Referring to the judgments of Rich and Dixon JJ in *Thompson v Palmer*,[97] Brennan J distinguished between 'relevant detriment' and detriment resulting merely from the failure to fulfil a promise:

> The relevant detriment in a case of equitable estoppel is detriment occasioned by reliance on a promise, that is, detriment occasioned by acting or abstaining from acting on the faith of a promise that is not fulfilled. The relevant detriment does not consist in a loss attributable

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their own, have been sufficient to raise the estoppel.

[96] (1996) 20 Fam LR 49, 66. The facts of the case were discussed in Chapter 1.

[97] (1933) 49 CLR 507, 520 (Rich J), 547 (Dixon J). Both judgments emphasised that to establish an estoppel *in pais* it is necessary for the representee to show that he or she has suffered detriment as a consequence of an act or omission resulting from the representation.

merely to non-fulfilment of the promise. The principle is analogous to the principle of estoppel in pais: see *Thompson v Palmer*.[98]

Applying that principle to the facts, Brennan J held that the exacerbation of Verwayen's ill health and the loss of a chance of success in the action flowed from the Commonwealth's failure to fulfil its promise, and not from any act done by Verwayen in reliance on that promise. Accordingly, like the detriments in the broad sense identified in *Blazely v Whiley* and *W v G*, they were not relevant detriments. The only relevant detriment that Verwayen suffered, in the view of Brennan J, was the financial cost of continuing with the action until the defence was amended. Accordingly, Brennan J would have remitted the matter to the trial judge so that that financial cost could be quantified.

In formulating the principles of his unified doctrine of estoppel by conduct, Deane J took a similar approach to Brennan J on the requirement of detriment. Deane J held that an estoppel will not arise unless the representee 'has adopted the assumption as the basis of action or inaction and *thereby* placed himself in a position of significant disadvantage if departure from the assumption be permitted'.[99] The word 'thereby' makes it clear that it is reliance loss, rather than merely the loss of an expectation that is required to invoke the doctrine. Although the principle applied by Deane J was the same as that applied by Brennan J, Deane J took a different view of what constituted relevant detriment on the facts. Deane J held that Verwayen continued the action on the faith of the assumption induced by the Commonwealth, and suffered increased stress, anxiety and inconvenience as well as increased ill-health as a result of that action.[100] '[T]he relevant detriment to Mr Verwayen would extend far beyond any question of legal costs'.[101]

Applying the principles of equitable estoppel, Dawson J viewed the detriment requirement, and the available evidence on the point, in a similar way to Deane

[98] (1990) 170 CLR 394, 429.
[99] Ibid 444 (emphasis added).
[100] Ibid 448-9.

J. He held that an estoppel would arise if the Commonwealth caused Verwayen to assume that it would not rely on its right to insist that the action was statute barred, and departure from that assumption would operate to Verwayen's detriment 'by reason of his having acted or omitted to act upon the basis of the assumption'.[102] Like Deane J, Dawson J held that the Commonwealth's conduct led Verwayen to continue the litigation, 'thereby subjecting himself to a prolonged period of stress'.[103] Accordingly, he regarded the estoppel as established.

The other member of the Court to discuss estoppel in detail, McHugh J, also approached the case on the basis of equitable estoppel. Such an estoppel will, he said, result in new rights between the parties where a representor has led a representee to assume that a particular legal relationship exists between them, knowing that the representee 'would act or refrain from acting on that assumption and if, *as a result* [the representee will] suffer detriment unless the assumption is maintained.'[104] The italicised words make it clear that the detriment required by McHugh J is the same as that which Brennan, Deane and Dawson JJ held to be prerequisites to the establishment of an estoppel. McHugh J held on the facts that any detriment suffered by Verwayen as a result of his reliance on the Commonwealth's conduct could be avoided by an order for costs.[105]

Although the requirement of detriment resulting from reliance has generally been applied strictly by the Australian courts in cases of both common law[106] and equitable estoppel,[107] problems have occasionally arisen in its application.

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[101] Ibid 449 (Deane J).
[102] Ibid 455-6.
[103] Ibid 462.
[104] Ibid 500 (emphasis added).
[105] Ibid 504.
[106] See, eg: *Thompson v Palmer* (1933) 49 CLR 507; *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723; *Chin v Miller* (1981) 56 FLR 359; *Territory Insurance Office v Adlington* (1992) 109 FLR 124.
[107] See, eg, *Je Maintiendrai Pty Ltd v Quaglia* (1980) 26 SASR 101, 106-07, 113-6; *Gollin & Co Ltd v Consolidated Fertiliser Sales Pty Ltd* [1982] Qd R 435, 448-55; *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 5 ASCR 720, 737; *Re Neal, ex parte Neal v Duncan Properties Pty Ltd* (1993) 114 ALR 659, 669; *S & E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122

First, in *Blazely v Whiley*, *W v G* and *Forbes v Australian Yachting Federation Inc*,[108] expectation losses were identified as the detriment required to establish an estoppel.[109] Secondly, in *Tasita v Papua New Guinea*, an estoppel was held to arise although no evidence of relevant detriment appears in the reported judgment.[110] Thirdly, in *McCraith v Fraser*, an estoppel was held to arise even though there was no more than a speculative possibility of detriment.[111] The courts are, however, generally consistent in denying recovery where the representee cannot point to a detrimental change of position in reliance on the relevant assumption, and many claims of estoppel have failed on that basis both at common law and in equity.[112]

ALR 637, 652; *Commonwealth v Clark* [1994] 2 VR 333, 367-81.

[108] (1996) 131 FLR 241, discussed in Chapter 7 below.

[109] In contrast with those cases, in *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, the Full Federal Court overturned a finding of estoppel on the ground, *inter alia*, that an expectation loss did not suffice as detriment. The respondent claimed that an estoppel arose against the Minister as a result of an intimation that the respondent would not be deported if he gave no further cause for being deported. Gummow J said that counsel for the respondent:

> pointed only to alleged "emotional or psychological" detriment which the respondent would suffer if the deportation order were to be implemented, but that in my view could not suffice. *It would not flow from any change of position which occurred on the faith of the alleged representation.*

Ibid 218 (emphasis added). The case was distinguishable from *Verwayen*, because the emotional or psychological detriment suffered by Verwayen resulted from the action he took in reliance on the Commonwealth's promises (continuing the litigation), rather than from the Commonwealth's breach of those promises alone: (1990) 170 CLR 394, 448-9 (Deane J), 462 (Dawson J); *contra* 429 (Brennan J).

[110] (1991) 34 NSWLR 691. Young J held that an equitable estoppel arose as a result of a landlord's representation to the tenant that it would accept a surrender of the lease. The effect of the estoppel was to prevent the landlord from denying that the lease had come to an end. There was, however, no evidence in the reported judgment that the tenant had acted on the faith of the representation, since they had amalgamated their operations with another travel agent prior to the representation being made. That amalgamation 'had the consequence that the premises leased were too small for the combined operation' and left the tenant with no alternative but to seek other premises (ibid 693).

[111] (1991) 104 FLR 227. An estoppel was held to arise where an insured was induced to believe that he would be indemnified by his insurer against liability to the plaintiff. Following *Hansen v Marco Engineering (Aust) Pty Ltd* [1948] VLR 198, Gray J held that the insured acted to his detriment by allowing the insurer to conduct the defence of the litigation on his behalf. The decision was overturned by the Northern Territory Court of Appeal on the basis that, in the absence of testimony that he would have conducted the litigation differently, there was no evidence that the insured had suffered material detriment on the faith of the assumption: *Territory Insurance Office v Adlington* (1992) 109 FLR 124.

[112] See, eg: *Thompson v Palmer* (1933) 49 CLR 507; *Donaldson v Freeson* (1934) 51 CLR 598; *Trenorden v Martin* [1934] SASR 340; *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723; *Gollin & Co Pty Ltd v Consolidated Fertilizer Sales Pty Ltd* [1982] Qd R 435; *Thomas Australia Wholesale Vehicle Trading Co Pty Ltd v Marac Finance Australia Ltd* [1985] 3 NSWLR 452; *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193; *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298, 305 & 307-8; *Chin v Miller* (1981) 56 FLR 359; *Territory Insurance Office v*

One final aspect of the detriment requirement which must be mentioned is that the detriment suffered or to be suffered by the representee as a result of reliance on the relevant assumption must be material,[113] significant,[114] or substantial.[115] This requirement is exemplified by the decision of the New South Wales Court of Appeal in *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd.*[116] In that case the representor induced the representee to believe that the representor would pay a certain sum of money to the representee in settlement of a disputed claim. On the faith of that assumption, employees of the representee made a number of trips to the representor's premises to collect a cheque in payment of the sum due. The Court of Appeal held that no equitable estoppel arose, in part because the detriment resulting from these 'fruitless visits' did not 'constitute a material or significant disadvantage or detriment sufficient to support an estoppel.'[117]

Adlington (1992) 109 FLR 124, 127-136; *Reg Russell & Sons Pty Ltd v Buxton Meats Pty Ltd* [1996] ATPR 41-476. See also Patrick Parkinson, 'Estoppel' in Patrick Parkinson (ed), *The Principles of Equity* (1996) 201, 244, n 229.

[113] *Thompson v Palmer* (1933) 49 CLR 507, 547 (Dixon J); *Newbon v City Mutual Life Assurance Society Ltd* (1953) 52 CLR 723, 734 (Rich, Dixon and Evatt JJ); *Chin v Miller* (1981) 37 ALR 171 (Fisher J); *Territory Insurance Office v Adlington* (1992) 109 FLR 124, 136 (Mildren J).

[114] *Verwayen* (1990) 170 CLR 394, 444 (Deane J). In *Sledmore v Dalby* (1996) 72 P & CR 196, 207, Hobhouse LJ suggested that the extent of detriment required may be different for different types of estoppel. In estoppel by representation, he suggested, the detriment element may be limited provided the representation is clear and unequivocal and there is reliance, whereas in proprietary estoppel the emphasis is on the detriment, which must accordingly be 'distinct and substantial'. This attempt to differentiate the detriment requirements seems unlikely to be followed in Australia, where the courts have recognised a greater commonality of principle between common law and equitable estoppel. Cf Mark Howard and Jonathan Hill, 'The Informal Creation of Interests in Land' (1995) 15 *Legal Studies* 356, 367-8, who argue that the attitude of the courts to detriment varies according to the strength of the representation. Where the representation or understanding between the parties is strong, they suggest, the courts take a 'fairly relaxed attitude' to the representee's detriment. Where the understanding is weak, as in cases of acquiescence, an equity will only arise if the representee's reliance is strong.

[115] *Je Maintiendrai Pty Ltd v Quaglia* (1980) 26 SASR 101, 117 (Cox J): 'The detriment need not be great but it must be substantial, not merely speculative or conjectural.' Benjamin Boyer, 'Promissory Estoppel: Requirements and Limitations of the Doctrine' (1950) 98 *University of Pennsylvania Law Review* 459, 475 suggests that the equivalent requirement in the United States can be justified on the basis of the *de minimus* doctrine.

[116] (1991) 22 NSWLR 298.

[117] Ibid 308 (Handley JA). Priestley JA, ibid 305 (with whom Clarke JA agreed), made a finding to similar effect. As Handley JA observed, ibid 308, a clear distinction can be drawn between the valuable consideration required to support a contract, for which a single peppercorn will suffice, and the material detriment required for an estoppel, which would not be established by the loss of a peppercorn. The distinction is justified on the basis that the consideration has been accepted as the price of a bargain, whereas estoppels lack the elements of acceptance and mutuality.

An even more stringent detriment requirement was imposed in *Lyndel Nominees Pty Ltd v Mobil Oil Australia Ltd*,[118] where Wilcox J held that that the detriment suffered by the representee must be proportional to the value of the representee's expectation. The case involved an incentive scheme operated by the Mobil oil company for its franchisees. The franchisees were told that any franchisee who met certain performance targets over a period of six years would be granted a nine year renewal of their franchise without charge. After four years, Mobil unilaterally abandoned the scheme by which the franchisees' performance was judged. Wilcox J held that, in order to make out a claim of promissory estoppel, a franchisee would need to show, *inter alia*, that 'the degree of detriment suffered by it was such as to make it necessary, in order to avoid Mobil acting unconscionably, for the court to require it to adhere to the assumption' that the franchise would be renewed.[119] The promissory estoppel claims failed because, although the franchisees incurred some additional costs in attempting to achieve the targets, Wilcox J was not satisfied that the total detriment suffered by any of them 'would exceed the value of the "reward" promised by Mobil'.[120] The degree of detriment was not proportional to 'the relief claimed by them.'[121]

The rejection of the franchisees' pleas of estoppel seemed to based on a requirement either that a representee's detriment must be proportional to the value of his or her expectation, or that it must be proportional to the value of the relief claimed. Both of these notions are inconsistent with the discretion and flexibility enjoyed by a court of equity in giving effect to an estoppel. It seems a curious interpretation of the judgments of the High Court in *Waltons Stores* and *Verwayen* to suggest, first, that the court is bound either to grant the relief claimed by the representee, or to grant expectation relief, and, secondly, that an estoppel is only made out only if the representee can establish that he or she has

[118] (1997) 37 IPR 599.
[119] Ibid 628.
[120] Ibid 629.
[121] Ibid.

suffered detriment which is proportional to such relief.[122] The case tends to confirm Patrick Parkinson's suggestion that there is a close connection between the detriment requirement and the approach taken in relation to relief.[123] Parkinson has suggested that a greater focus on what is an adequate detriment to found an estoppel can be expected if expectation relief is taken as the starting point. The *Lyndel Nominees* case shows that, if the courts take expectation relief as the necessary finishing point, then the detriment requirement must clearly be even more stringent.

III. PROOF OF RELIANCE

The element of detrimental reliance in estoppel effectively requires three causal links. First, it requires a causal link between the conduct of the representor and the assumption adopted by the representee. Secondly, it requires a causal link between the assumption adopted by the representee and the action taken by him or her. Thirdly, it requires a causal link between the action taken by the representee and the detriment he or she has suffered, or would suffer if the representor were allowed to depart from the assumption. These causal links are usually abbreviated into more simple formulae.[124] We are concerned here with the first and second of those requirements. Clearly, it is not sufficient for the representee simply to prove that he or she took action after being induced to make the relevant assumption. The representee must prove that he or she took action because he or she was induced by the representor to make the relevant assumption.[125] In many cases proving reliance will be a simple matter of the

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[122] The notion that the remedy can govern liability in this way appears to misconceive the proper order of analysis: the estoppel dog is being wagged by its remedial tail.

[123] Above n 112, 248.

[124] In *Wayling v Jones* (1995) 69 P & CR 170, 173, Balcombe LJ abbreviated the three requirements when he observed that there 'must be a sufficient link between the promises relied upon and the conduct which constitutes the detriment'. Mason CJ abbreviated the second and third requirements when he said in *Verwayen* (1990) 170 CLR 394, 415 that 'the detriment must flow from the reliance upon the assumption'.

[125] In *Thomas Australia Wholesale Vehicle Trading Co Pty Ltd v Marac Finance Australia Ltd* [1985] 3 NSWLR 452, the representee was unable to establish an estoppel because its detrimental action was not taken in reliance on the representor's conduct. Although the representor had failed to register its interest in a motor vehicle, the representee had failed to search the register before it purchased the vehicle. Thus 'the evidence established that [the representor's conduct] had no causal connection with the [representee's] loss': ibid 468 (Glass

representee giving evidence that he or she took particular action in reliance on the assumption in question, which was induced by the representor's conduct. There will often be no basis on which the representor can challenge such evidence and it will be accepted without more. In *Waltons Stores*, for example, the evidence of reliance cited by Mason CJ and Wilson J was that given by Mr Maher that he would not have 'gone ahead and done the work' had he been aware of the true state of affairs.[126] Similarly, in *Verwayen*, Mason CJ found that 'there is no reason to doubt the respondent's assertion that he made the assumption and continued his action against the Commonwealth in reliance on it.'[127]

A. *The Burden of Proving Reliance*

There are two central doctrinal questions relating to proof of reliance. The first is who bears the onus of proof: does it lie on the representee to prove reliance in order to make out an estoppel, or need the representor disprove reliance? The second question is what test the courts should apply to determine whether the reliance has been sufficiently causative. In relation the first question, it seems that while the burden of proving reliance will *prima facie* rest with the representee, that burden will shift to the representor where reliance is a natural consequence of the assumption which the representee is induced to adopt. As noted above, in *Thompson v Palmer* Dixon J held that the burden of proving reliance lay upon the representee, and found that no estoppel arose in that case because the representee had not discharged that burden.[128]

That approach is consistent with the subsequent decision of the High Court in *Newbon v City Mutual Life Assurance Society Ltd*, in which a plea of estoppel failed on the ground that the representee had failed to establish a causal link

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JA). The principle is analogous to that applied in deceit cases. In *Smith v Chadwick* (1882) 20 Ch D 27, 67 (Jessell MR), 74-5 (Cotton LJ), 80 (Lindley LJ), the English Court of Appeal held that an action for deceit could not be maintained where the representee established that he had taken detrimental action after the representation, but did not establish a causal link between the representation and his detrimental action.

[126] (1988) 164 CLR 387, 386.

[127] (1990) 170 CLR 394, 414.

[128] (1933) 49 CLR 507, 548-9.

between the detriment he suffered and the representor's conduct.[129] The case was concerned with the enforceability of a life assurance policy. Under its terms, the policy became voidable if a premium remained unpaid for more than one month after its due date. After the assured had failed to pay an instalment, the Society gave notice of its intention to treat the policy as void, but continued to send the assured annual bonus certificates for some years thereafter. When the assured died, the administrator of his estate sought to enforce the policy on the basis that the Society was estopped from denying that it remained on foot. The plaintiff argued that the receipt of the annual bonus certificates up until one month before his death had induced the assured to believe that the policy was on foot, and he took no steps toward reviving his policy or obtaining life assurance elsewhere. The High Court unanimously held that no estoppel arose, the majority on the ground that the plaintiff had failed to establish a causal connection between the assumption and the position of detriment.[130] Rich, Dixon and Evatt JJ suggested that a *prima facie* inference may be drawn in favour of such a causal connection in a case where 'inaction is the natural consequence of the assumption in question'.[131] In the present circumstances, however, there was no reason to draw such an inference and no reason to believe that the representee's failure to obtain insurance on his life was caused by the belief, if it existed, that the policy with the representor was still on foot.[132]

The notion that a *prima facie* inference in favour of reliance arises in certain circumstances is supported by a long line of English cases. In the promissory estoppel case *Brikom Investments Ltd v Carr*,[133] Lord Denning MR linked the burden of proof to the intention that could be imputed to the representor: 'Once it is shown that a representation was calculated to influence the judgment of a reasonable man, the presumption is that he was so influenced.'[134] The principle

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[129] (1935) 52 CLR 723.
[130] Ibid 735 (Rich, Dixon and Evatt JJ). The other member of the Court, Starke J, held that it was impossible to impute to the Society a representation that the policy was on foot, or to conclude that the assured acted on any such representation: ibid 738.
[131] Ibid 735.
[132] Ibid.
[133] [1979] QB 467.
[134] Ibid 482-3.

has been employed regularly in proprietary estoppel cases. In *Greasley v Cook*,[135] the Court of Appeal overturned the decision at first instance on the basis that the trial judge had erred in relation to the burden of proving reliance. The defendant in that case had been employed as a housekeeper by Arthur Greasley, a widower who had four children, Hedley, Kenneth, Clarice and Howard. After Arthur Greasley died, the defendant continued to live in the family home caring for Kenneth, with whom she lived as *de facto* husband and wife, and Clarice, who was mentally ill. That arrangement, under which the defendant received no wages, continued for some 27 years until Kenneth and Clarice died. The then owners of the house, Hedley and one of Howard's daughters, then brought proceedings to evict the defendant from the house. The defendant claimed she was entitled to relief by way of proprietary estoppel, and established that Hedley and Kenneth had, when they were the owners of the house, assured her that she would be able to remain there for the rest of her life.

The trial judge held that for the defendant to succeed she would have to prove that she had acted to her detriment 'as a result of' or 'because of' her belief that she would be entitled to remain in the house.[136] He held that the burden lay on the representee to establish reliance as a fact, and the defendant had failed to discharge that burden. The Court of Appeal held that the trial judge was in error in the way he put the onus of proof, and found that an estoppel was made out. Lord Denning MR applied the principle he articulated in *Brikom Investments Ltd v Carr*, that where representations are 'calculated to influence the judgment of a reasonable man' then the burden shifts to the representor to show that the representee did not rely on them.[137] He held that the statements made by Kenneth and Hedley Greasley were calculated to influence the defendant, she had acted to her detriment by staying on to look after the family rather than seeking paid work and, accordingly, a presumption of reliance arose. The onus lay on the plaintiffs to prove that she did not rely on the assurances.[138] Waller LJ, on the other hand, adopted an approach which is more consistent with that

[135] [1980] 1 WLR 1306.
[136] Ibid 1310.
[137] [1980] 1 WLR 1306, 1311.

applied by the High Court in *Newbon v City Mutual Life Assurance Society Ltd.* He held that the court would infer reliance where the statement was of such a nature as would naturally tend to induce a person into a course of conduct.[139]

Applying that principle to the present facts, Waller LJ found that the assurances made to the defendant were such that they would naturally tend to induce a course of conduct on her part, and accordingly the trial judge was wrong to find against the defendant on the basis that reliance was not proved. The third member of the Court of Appeal in *Greasley v Cook*, Dunn LJ, agreed with Lord Denning,[140] and accordingly the approach that focused on the intention or imputed intention of the representor can be said to have commanded majority support. Lord Denning's approach is clearly different from that applied by Waller LJ, which is concerned with the question whether reliance flowed naturally from the assumption in question. In some subsequent cases judges have been content to apply the principle in *Greasley v Cook*, without making clear whether they are applying Lord Denning's version of the principle or that of Waller LJ.[141] The approaches adopted in *Combes v Smith*[142] and *Wayling v Jones*[143] were different again.

In *Coombes v Smith*, Jonathan Parker QC held that where the representee shows that he or she adopted a prejudicial course of conduct following a promise or assurance, then a rebuttable presumption of reliance arises.[144] That presumption did not seem to depend on the representor's intention or on whether the conduct flowed naturally from the promise or assurance. In *Wayling v Jones*, on the other hand, the Court of Appeal adopted an approach

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[138] Ibid.
[139] Ibid 1313, applying a principle articulated in the deceit case *Smith v Chadwick* (1882) 20 Ch D 27, 44 (Jessel MR).
[140] Ibid 1313-4.
[141] *Hamp v Bygrave* (1983) 266 EG 720; *Re Basham (dec'd)* [1986] 1 WLR 1506-7; *Grant v Edwards* [1986] 1 Ch 638, 657 (where Browne-Wilkinson VC applied the principle in the context of the establishment of a constructive trust).
[142] [1986] 1 WLR 808.
[143] (1985) 69 P & CR 170.
[144] [1986] 1 WLR 808, 821.

to the burden of proof that looks to the nature of the conduct engaged in by the representee:

> Once it has been established that promises were made, and that there has been conduct by the plaintiff of such a nature that inducement may be inferred then the burden of proof shifts to the defendant to establish that he did not rely on the promises.[145]

In that case the representee had worked for the representor, with whom he was in an emotional relationship of cohabitation, following a promise by the representor that he would leave his hotel business to the representee. The Court of Appeal held that the representee's conduct in helping to run the business, receiving only a small amount of pocket money in return, was conduct from which his reliance on the representor's promises could be inferred.[146] Although it is not entirely clear, that approach appears to be essentially the same as that applied by the High Court in *Newbon v City Mutual Life* and by Waller LJ in *Greasley v Cook.*

In summary, it seems that while the burden of proving reliance rests with a person seeking to establish an estoppel, a rebuttable presumption of reliance will quite readily be made.[147] Unfortunately, the circumstances in which the presumption will be made are far from clear. It may depend on the representor having an intention to induce reliance,[148] it may depend on the acts of reliance flowing naturally from the assumption adopted,[149] or it may depend simply on

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[145] (1985) 69 P & CR 170, 173 (Balcombe LJ, with whom Hoffmann LJ agreed).
[146] Ibid.
[147] It is also clear that reliance can be inferred from the relevant circumstances: *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 1 WLR 1265, 1287 (Oliver LJ for the Court of Appeal).
[148] This approach finds support in *Brikom Investments Ltd v Carr* [1979] QB 467, 482-3 (Lord Denning MR); *Greasley v Cook* [1980] 1 WLR 1306, 1311 (Lord Denning MR) and, by analogy with actionable misrepresentation, in *Gould v Vaggelas* (1984) 157 CLR 215, 236 (Wilson J) and *Redgrave v Hurd* (1881) 20 Ch D 1, 21 (Jessell MR).
[149] This approach finds support in *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723, 735 (Rich, Dixon and Evatt JJ); *Greasley v Cook* [1980] 1 WLR 1306 (Waller LJ) and, by analogy with the tort of deceit, in *Smith v Chadwick* (1882) 20 Ch D 27, 44 (Jessel MR) and *Reynell v Sprye* (1852) 1 D M & G 660; 42 ER 710, 728-9 (Lord Cranworth).

detrimental action following the promise or assurance.[150] The better view, at least in Australia, seems to be that the acts of reliance must flow naturally from the relevant assumption before a presumption of reliance will be made.

B. *Reliance and Causation*

Of more importance to this thesis is the situation in which detrimental action is taken by a representee for a number of reasons, only one of which involves reliance upon the actions of the representor. The interesting issue is the approach that should be taken in testing whether the reliance caused the detrimental conduct in question. Where more than one reason motivated the representee to take the relevant action or inaction, what test should the court apply to determine whether the assumption induced by the representor's conduct was sufficiently causative?

Although the courts have not explored in any great detail the approach to be taken to this question, it seems to be quite well accepted that a representee need only establish that the assumption was one of the factors motivating the detrimental action. In *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd*, Robert Goff J said at first instance that it was no bar to an estoppel that the representee's detrimental conduct did not derive its origin only from the encouragement or representation of the representee.[151] The Court of Appeal in *Wayling v Jones* cited that statement in support of the proposition that 'the promises relied on do not have to be the sole inducement for the conduct - it is sufficient if they are an inducement.'[152] That principle was applied in *Re Basham (dec'd)*, a case in which Edward Nugee QC upheld a proprietary estoppel where he was satisfied that one reason why the representee acted as she did was the belief induced by the representor's conduct.[153]

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[150] *Coombes v Smith* [1986] 1 WLR 808, 821 (Jonathan Parker QC).
[151] [1982] QB 84, 104 ('*Texas Bank*').
[152] (1995) 69 P & CR 170, 173 (Balcombe LJ, with whom Hoffmann LJ agreed).
[153] [1986] 1 WLR 1498, 1507.

A similar approach has been taken in Australia. In *Austral Standard Cables Pty Ltd v Walker Nominees Pty Ltd*,[154] Handley JA applied the principle that 'an estoppel by representation may be established where the representor's conduct is *a* cause, though not necessarily *the* cause of the representee's reliance.'[155] The principle was also recognised by Kirby P.[156] As Handley JA observed, this is consistent with the principles governing actionable representations.[157] It is also consistent with the approach adopted and applied by the majority of the Privy Council in *Barton v Armstrong* in relation to the question whether duress to the person was sufficiently causative to vitiate a contract.[158] Their Lordships held that it was sufficient if the relevant threats were 'a' reason for the plaintiff entering into the contract or if they contributed to the decision, even if the contract may have been signed anyway.[159] An identical approach has been taken to causation in relation to economic duress, that it is sufficient if the illegitimate pressure was 'one of the reasons for the person entering into the agreement'.[160] The same principle applies in relation to proving reliance on misleading or deceptive conduct in breach of s 52 of the Trade Practices Act.[161]

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[154] (1992) 26 NSWLR 524.

[155] Ibid 540 (emphasis added), citing the statement of Brennan J in *Foran v Wight* (1989) 168 CLR 385, 427 that where a contract involves mutually dependent obligations, and a party to that contract (A) intimates that they will not perform the contract and that it will be useless for the other party (B) to tender performance, and B is not ready and willing to perform B's obligations because B has relied '(at least in part)' on A's intimation, then the usual requirement that B must be ready and willing to perform the contract before B can rescind for A's breach is dispensed with.

[156] (1992) 26 NSWLR 524, 526. The approach is also supported by the statement of Franklyn J in *Osborne Park Cooperative Building Society Ltd v Wilden Pty Ltd* (1989) 2 WAR 77, 100 that: 'The assumption ... must be *a cause* of [the representee's] alteration of position' (emphasis added).

[157] Handley JA quoted the statement from his joint judgment with Meagher JA in *Demetrios v Gikas Dry Cleaning Industries Pty Ltd* (1991) 22 NSWLR 561, 569-70 that 'a fraudulent misrepresentation may be only one of a number of causes which together induced the plaintiff to act to his detriment and suffer the losses for which compensation is sought.' The notion that a fraudulent misrepresentation need not be the sole inducement to enter into a contract is also supported by *Edgington v Fitzmaurice* (1885) 29 Ch D 459, 481 (Cotton LJ), 483 (Bowen LJ), 485 (Fry LJ) and *Gould v Vaggelas* (1984) 157 CLR 215, 236 (Wilson J), 250-1 (Brennan J).

[158] [1976] AC 104.

[159] Ibid 118-20.

[160] *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40, 46 (McHugh JA).

[161] The principles articulated by Wilson J in *Gould v Vaggelas* (1984) 157 CLR 215, 236 have been adopted for the determination of the question of reliance under s 82 of the Trade Practices Act 1974 (Cth), where a person claims they are entitled to be compensated for loss or damage suffered 'by' conduct in contravention of s 52 of the Act, as a result of reliance on such conduct: *Sutton v AJ Thompson Pty Ltd (in liq)* (1987) 73 ALR 233, 240; *Argy v Blunts and Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112, 135-6; *Dominelli Ford (Hurstville) Pty Ltd*

It seems quite clear, and quite consistent with analogous doctrines, that reliance on the relevant assumption need not be the sole reason for the detrimental course of conduct taken by the representee, but can be one of a number of contributing factors, and perhaps even a minor one at that.[162] After noting this principle in *Texas Bank*, Robert Goff J went on to discuss the principles for determining causation where a person has proceeded initially on the basis of a belief derived from a source independent of the representor, but subsequently has that belief confirmed by the representor's representation or encouragement. The question for the court in that situation is whether the representor's conduct is sufficiently causative.[163] According to Goff J, that question should be determined by reference to the representor's conscience:

> In such a case, the question is not whether the representee acted, or desisted from acting, solely in reliance on the encouragement or representation of the other party; the question is rather whether his conduct was so *influenced* by the encouragement or representation ... that it would be unconscionable for the representor thereafter to enforce his strict rights.[164]

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v Karmot Auto Spares Pty Ltd (1992) 38 FCR 471, 482-3; *Clyde Industries Pty Ltd v Golden West Refineries Corp Ltd* (1996) ATPR (Digest) 46-160, 53,374; *Leda Holdings Pty Ltd v Oraka Pty Ltd* [1998] ATPR 41-601, 40,515. See further Nick Seddon, 'Misleading Conduct: The Case for Proportionality' (1997) 71 *Australian Law Journal* 146, 148-51.

[162] A similar question arises in determining relief to give effect to equitable estoppel. In *The Public Trustee, as Administrator of the Estate of Williams (dec'd) v Wadley* (Full Court of the Supreme Court of Tasmania, Wright, Crawford and Zeeman JJ, 27 June, 1997), a question arose relating to the amount of domestic work performed by the plaintiff in reliance on her father's promise that he would leave his house to her when he died. Crawford J considered that the court should compensate only that work which was done on the faith of the promise, disregarding work which would have been performed in any event. Zeeman J, on the other hand, did not think it was appropriate to adopt a 'but for' approach, and thought it irrelevant that some of the work may have been done even if no promise had been made. The approach of Zeeman J appears to be more consistent with the approach taken to proving reliance in the cases discussed above.

[163] Although it is interesting to note that in *Australian Steel & Mining Pty Ltd v Corben* [1974] 2 NSWLR 202, 209, Hutley JA approved a passage from HLA Hart and AM Honoré, *Causation in the Law* (1959) 177, that liability can be based on a false representation that induces the representee *'to persevere in a decision already reached'* (emphasis added).

[164] [1982] QB 84, 104-5.

The approach proposed by Goff J is an unusual way to approach a question of causation. The court is concerned here with the factual question of what motivated the representor to adopt a detrimental course of action.[165] It is well accepted in the tort of negligence that causation is a question of fact to be determined by reference to common sense and experience.[166] In the passage quoted above, however, Goff J appears to have suggested that in estoppel this factual question should be determined by reference to the representor's conscience. While the manner in which a representor has encouraged the adoption of an assumption may be relevant to the question whether it is unconscionable for the representor subsequently to depart from that assumption,[167] it is difficult to see what role that encouragement should play in the question of reliance, other than an evidentiary one.[168] The extent of the representor's influence is clearly an important question in such a case, and the conduct of the representor must clearly be disregarded if it is not sufficiently causative. But it is equally clear that the question of causation is a factual question which must be concerned with the party taking action in reliance on that representation. Accordingly, attention should be focussed on the representee for this purpose, testing from the representee's perspective the extent to which the representor's conduct was causative, as Fry LJ made clear in *Seton, Laing, & Co v Lafone*:

> In order to ascertain whether a statement by one person has brought about the action of the other, you must look at the condition of mind and

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[165] *Edgington v Fitzmaurice* (1885) 29 Ch D 459, 483 (Bowen LJ): the question whether a representation caused the representee to act in a particular way 'resolves itself into a mere question of fact.'

[166] *March v E M & H Stramere Pty Ltd* (1991) 171 CLR 505, 515 (Mason CJ), 523 (Deane J), 524 (Toohey J); *Bennett v Minister of Community Welfare* (1992) 176 CLR 408, 412-3 (Mason CJ, Deane and Toohey JJ), 418-9 (Gaudron J), 428 (McHugh J); *Medlin v State Government Insurance Commission* (1995) 182 CLR 1, 6 (Deane, Dawson, Toohey and Gaudron JJ). See further Hart and Honoré, above n 163, Jane Stapleton, 'Law, Causation and Common Sense' (1988) 8 *Oxford Journal of Legal Studies* 111 and 'Symposium on Causation in the Law of Torts' (1987) 63 *Chicago-Kent Law Review* 397.

[167] See Chapter 6.

[168] Its evidentiary role may be important, since testimony from the representee as to his or her state of mind may regarded as unreliable: see Roy Williams, 'Proof of Inducement in Actions for Deceit and Contravention of Section 52 of the Trade Practices Act' (1987) 3 *Australian Bar Review* 170, 172-3.

circumstances of the person to whom the statement was made not of the person who made the statement.[169]

The authorities support Justice Goff's statement that the relevant question in relation to causation is not whether the representor acted solely in reliance on the representor's conduct. Nor is the relevant question a 'but for' question: it is clear from the authorities that the court is not concerned to inquire how the representee would have acted had it not been for the adoption of the relevant assumption, or had it not been for the representor's conduct.[170] In the fraudulent misrepresentation case *Demetrios v Gikas Dry Cleaning Industries Pty Ltd*,[171] Handley and Meagher JJA approved a statement from Spencer Bower and Turner that whether the representee would have acted differently had full disclosure been made is 'a question to which the law does not require an answer. It is enough if the full and exact revelation of the material facts *might* have prevented him from doing so.'[172] Similarly, in *Barton v Armstrong* the majority of the Privy Council held that Barton was entitled to relief on the ground of duress if the threats contributed to his decision to enter into the contract, even though 'he might well have entered into the contract if Armstrong had uttered no threats to induce him to do so.'[173]

It is clear from the cases discussed above that the conscience-based approach to reliance articulated by Goff J in *Texas Bank* has not been embraced by either the English or Australian courts. The proper approach to the question of reliance is to

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[169] (1887) 19 QBD 68, 74.

[170] In *Brikom Investments Ltd v Carr* [1979] 2 All ER 753, 758-9, Lord Denning MR disavowed suggestions that his judgment in *Alan & Co v El Nasr Export and Import Co* [1972] 2 QB 189, 213 could be read as supporting a 'but for' approach to reliance.

[171] (1991) 22 NSWLR 561, 569-70.

[172] George Spencer Bower and Sir Alexander Turner, *The Law of Actionable Misrepresentation* (3rd ed, 1974) 139-40 (emphasis added).

[173] [1976] AC 104, 119. The position is less clear in relation to reliance on negligent misstatements. In *Parramatta City Council v Lutz* (1988) 12 NSWLR 293, 235, McHugh JA appeared to apply a but for test when he held, in a dissenting judgment, that an action for negligent misrepresentation must fail where the probabilities were such that the plaintiff would not have taken any action to avoid the relevant damage apart from the action she did take. The High Court has since held, however, that a 'but for' test is not an appropriate means of assessing causation in a negligence case in which there are two or more events that could be said to have brought about the plaintiff's injury: *March v E & M H Stramere Pty Ltd* (1991) 171 CLR 506.

address it as a factual question of causation. If the assumption induced by the representor's conduct contributed in any way to the detrimental course of conduct embarked upon by the representee, then the causal link between the assumption and the detriment is effectively established.

IV. THE THEORETICAL SIGNIFICANCE OF THE REQUIREMENT

The strict detrimental reliance requirement imposed by the Australian courts has significant theoretical implications for estoppel by conduct. The first point to note is that it helps us to draw a clear distinction between a doctrine of estoppel based on promise and one based on reliance. As Lord Denning's judgments have indicated, and as his extra-judicial observations have made clear, a doctrine of estoppel based on promise looks to the nature and circumstances of the promise itself, rather than its effect on the promisee. Accordingly, the court's attention is focussed on the intentions of the person making the promise, rather than on the effect of the promise on the promisee. As Lord Denning has said, such a doctrine is more accurately described as a contractual source of rights than as an estoppel. The strict detrimental reliance requirement imposed in Australia can, therefore, be seen as an alternative to the contractual 'intention to affect legal relations requirement' applied by Lord Denning in relation to promissory estoppel. The adoption of that alternative as the central requirement of the Australian doctrines of estoppel marks those doctrines as fundamentally concerned with issues of reliance, rather than promise.

The second observation that can be made is that the adoption of detrimental reliance as the focal doctrinal requirement, or as the central ingredient leading to the establishment of an estoppel, lends a unity to the various types of estoppel by conduct operating in Australia. The influence of Justice Dixon's comments in *Thompson v Palmer* and *Grundt* as to the centrality of detrimental reliance has been observed in relation to estoppel by representation, promissory estoppel and proprietary estoppel, as well as each of the unified estoppels that have been proposed. The Australian position can be contrasted with the position in England, where it is arguable that promissory estoppel is essentially

contractual in nature, and thus has entirely different conceptual foundations from those supporting proprietary estoppel.[174]

The third question of theoretical significance is the approach taken by the courts to the establishment of reliance. The approach articulated by Robert Goff J in *Texas Bank* is most consistent with a conscience basis for estoppel. If a doctrine of estoppel is essentially concerned with preventing unconscionable conduct, then it may be appropriate to test reliance by reference to the influence which the representor's conduct had on the representee and the extent to which the representor can, given that influence, depart from the relevant assumption in good conscience. If, on the other hand, the court is essentially concerned with protecting against the detrimental consequences of reliance, then the court should focus on the reliance itself, and the extent to which that reliance is causative. There may not, in the end, be any great difference between the results produced by the two approaches, but there is a significant difference in terms of the philosophy of estoppel.

[174] Margaret Halliwell, 'Estoppel: Unconscionability as a Cause of Action' (1994) 14 *Legal Studies* 15, 22-30.

Chapter 5

THE REASONABLENESS REQUIREMENT*

An important limit on the availability of both common law and equitable estoppel is the requirement that, for an estoppel to arise, the representee must act reasonably in both adopting and acting on the relevant assumption. This 'reasonableness' requirement is closely connected with the other elements required to establish an estoppel. It is linked to the threshold requirement because the reasonableness of adopting a given assumption will often depend on the type of conduct engaged in by the representor which is claimed to have induced that adoption. If a doctrine of estoppel required a particular type of conduct as the threshold requirement, such as a clear promise or a clear representation, then there would be less emphasis on the reasonableness requirement. The reasonableness requirement can thus be seen to occupy ground left vacant by the low threshold requirement discussed in Chapter 3.[1]

If one were framing an estoppel doctrine in the abstract then an important question would be whether reasonableness should be considered from the point of view of the representor or the representee, or both. That choice is extremely important both from the point of view of highlighting the conflicts between the different philosophies of equitable estoppel, and in illustrating the orientation of the Australian doctrine towards reliance. We are concerned here with the imposition of an objective test which limits the availability of a plea of estoppel. An objective test can be imposed from the point of view of the representee, with an estoppel arising only if the representee's reliance was reasonable in the circumstances. Alternatively, the objective test can be imposed from the point of

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* Parts of this chapter have been published in 'Situating Equitable Estoppel Within the Law of Obligations' (1997) 19 *Sydney Law Review* 32-64 and 'The "Reasonableness" Requirement in Estoppel' (1995) 1 *Canberra Law Review* 231-235.

[1] This connection between reasonableness and the threshold requirement is implicit in the argument made by DW Greig and JLR Davis, *The Law of Contract* (1987) 149-55 that the alternative to a restrictive threshold requirement, requiring an unequivocal promise or representation, is an objective approach, 'based upon the overriding concept of reasonable reliance.' (Ibid 155). A restrictive threshold requirement is unnecessary in a doctrine that requires

view of the representor, with an estoppel arising only where the representor should reasonably have expected reliance by the representee.

In Australia and England, reasonableness is usually considered from the point of view of the representee, who must act reasonably in adopting and acting upon the relevant assumption. In the United States, on the other hand, reasonableness is usually considered from the point of view of the representor, who must reasonably expect reliance before liability will arise. It has also been suggested in some cases that, under English and Australian law, the question whether a representor should reasonably have expected reliance is relevant to the establishment of an estoppel. That question of knowledge or an expectation of reliance links the reasonableness question with the unconscionability question which, as Chapter 6 will show, turns primarily on questions of notice or imputed notice of reliance.

The Australian reasonableness of reliance requirement has also been justified on the basis that it is not unconscionable to depart from an assumption unless the assumption was reasonably adopted and reasonably relied upon.[2] In other words, it has been justified as an conscience-based requirement. This chapter will argue, however, that the reasonableness of reliance requirement, given its focus on the representee, is in fact a reliance-based requirement. That reliance-based limit on the availability of a plea of estoppel will be contrasted in this chapter with the requirement in the United States that the representor must reasonably foresee reliance, which can more accurately be said to evidence a concern with unconscionable conduct.

I. THE NATURE OF THE REASONABLENESS INQUIRY

The first aspect of the reasonableness requirement to be considered is the nature of the requirement itself. The nature of the reasonableness inquiry has not been

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a representee to act reasonably in adopting and acting upon the relevant assumption.

[2] *Commonwealth v Verwayen* (1990) 170 CLR 394, 445 (Deane J); *Australian Securities Commission v Marlborough Gold Mines Pty Ltd* (1993) 177 CLR 485, 506 (Mason CJ, Brennan,

considered in any detail in the estoppel cases or literature, but assistance can be derived from the law of negligence which is, of course, structured around the norm of 'reasonable care'.[3] It is generally accepted in the law of negligence that the reasonableness question requires the court to make a policy decision as to what is prudent and sensible behaviour, taking into account the behavioural norms of the time and place.[4] Although evidence as to the standard practice of those engaged in a particular activity may be relevant,[5] the question of reasonableness is clearly not exclusively a factual question, because standard practice may itself be regarded by the court as deficient.[6] As Francis Trindade and Peter Cane have observed, it is a function of the law of negligence to identify which risks are socially acceptable, and this is a 'social question' which must ultimately be answered by the courts.[7]

Similarly, the reasonableness requirement in estoppel requires the courts to determine the circumstances in which reliance on another person's conduct is

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Dawson, Toohey and Gaudron JJ).

[3] Assistance can also be derived from the reasonable person standard in the rule in *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 145. LL Fuller and William Perdue, 'The Reliance Interest in Contract Damages: 1' (1936) 46 *Yale Law Journal* 52, 86 suggest that stating the remoteness of damage problem in terms of the reasonable person 'creates a bias in favour of exempting *normal* or *average* conduct from legal penalties.' Similarly, it could be said that restricting the availability of estoppel by reference to reasonableness creates a bias in favour of protecting those who engage in normal or average conduct from the particular harm with which estoppel is concerned. For a detailed examination of the use of the reasonable person standard in contract law and its ecclesiastic and philosophical foundations, see Larry DiMatteo, 'The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment' (1997) 48 *University of Southern California Law Review* 293.

[4] MA Millner, 'Tort: Cases and Materials by BA Hample' (1976) 92 *Law Quarterly Review* 131, 133.

[5] *Neill v NSW Fresh Food and Ice Pty Ltd* (1963) 108 CLR 362, 368 (Taylor and Owen JJ).

[6] *Mercer v Commissioner for Road Transport and Tramways (NSW)* (1936) 56 CLR 580, esp at 589 (Latham CJ). In *F v R* (1983) 33 SASR 189, 194, King CJ said that the ultimate question is whether the defendant's conduct conforms to the standard of care required by the law, not whether it accords with the practice of the defendant's profession. Without explicitly refering to the reasonableness question, Jules Coleman, 'The Practice of Corrective Justice' in David Owen (ed), *Philosophical Foundations of Tort Law* (1995) 53, 69-72 has provided a justification for this approach from a philosophical point of view, arguing that corrective justice is a moral duty which is neither entirely independent of human practices, nor entirely fixed by the practices existing at any given time.

[7] Francis Trindade and Peter Cane, *The Law of Torts in Australia* (2nd ed, 1993) 428. Peter Cane, *The Anatomy of Tort Law* (1997) 42 has expanded on this point:

> Reasonableness is not a question of what people actually do but of what courts think is a reasonable standard of conduct for society to enforce against its citizens through the mechanism of tort law. What people actually do provides a starting point for this inquiry, but it is only a starting point. The courts have a constitutional responsibility to establish standards of conduct for society.

socially acceptable, and the extent of reliance that is socially acceptable in particular circumstances. The reasonableness standard imposes responsibility on a representee to take care to protect his or her own interests, and defines the standard of care that must be taken.[8] As Patrick Atiyah has observed, reliance on a promise alone cannot justify the imposition of liability on the promisor; something extra is required.[9] The reasonableness standard provides that extra element, ensuring 'compliance with some socially acceptable values which determine when ... [reliance is] sufficiently justifiable to give some measure of protection.'[10] The application of the reasonableness standard thus involves a sophisticated policy question which requires the court, while taking into account community standards, to establish norms of conduct.[11] In defining the limits of the neighbourhood responsibility of representors for harm resulting from the reliance of others on their conduct, the reasonableness standard implicitly imposes a level of individual responsibility on representees to take care to prevent harm to themselves.[12] The development of those standards of acceptable behaviour and acceptable reliance necessarily involve the allocation of risk and responsibility.

If it is accepted that the reasonableness standard is essentially a policy question, then it is important to ask whether that policy question is better framed as a question of reasonableness than as a question of unconscionability. It might be argued that the policy work performed by the reasonableness question could equally well be done by asking whether it was 'unconscionable' for the representor to act as he or she did. The essential reason why the reasonableness

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[8] The plaintiff's failure to take care to take care to protect his own interests was one of the reasons for the failure of the plea of estoppel by acquiescence in *Dann v Spurier* (1802) 7 Ves 231; 32 ER 94. The plaintiff expended a considerable sum of money in repairing demised premises after he had been told by the landlord that his acceptance as a tenant was not assured. Eldon LC held that 'the plaintiff has not used the degree of circumspection and caution, that the Court can act upon the latter part of the prayer of this bill, consistently with the reasonable security of the affairs of mankind' (ibid 95).

[9] PS Atiyah, *Promises, Morals and Law* (1981) 68.

[10] Ibid.

[11] Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685, 1688 describes reasonableness as a standard, the application of which 'requires the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard.'

[12] Paul Finn, 'Commerce, the Common Law and Morality' (1989) 17 *Melbourne University*

requirement is a better way to approach the policy question is that it is a more sophisticated and more precisely defined inquiry.

The reasonableness inquiry is not an open-ended question whether liability should be imposed in the circumstances. Rather, the court's attention is directed to the position of the representee for the purposes of a two-part inquiry. The first question relates to the adoption of the relevant assumption by the representee. The question whether it was reasonable for the representee to adopt the assumption in question directs the court's attention to the conduct of the representor, and to the relationship between the parties. The second question relates to the reasonableness of the representee's reliance. Assuming it was reasonable for the representee to adopt the relevant assumption, the court then needs to consider whether it was reasonable for the representee to act on the faith of that assumption in the way he or she did. This will depend on the nature of the action taken by the representee in reliance on the relevant assumption, in the context of the relationship between the parties and the other circumstances of the case. The court may regard it as reasonable in certain circumstances to adopt a certain assumption, and reasonable to act on the faith of the assumption in a limited way, but not reasonable in the circumstances to take such detrimental action as that taken by the representee. In such a case the reasonableness requirement must be linked to the question of remedy, at least if one accepts a reliance-based approach to determining relief. If only reasonable reliance is protected by a doctrine of estoppel, and only some of the representee's acts of reliance were reasonable, then only the detriment flowing from the reasonable acts of reliance should be prevented or compensated by the court.

The important questions relating to the nature and appropriateness of the reasonableness requirement will be taken up again at the end of this chapter, in a discussion of criticism of reasonableness as a basis of promissory liability.

Law Review 87, 97-8.

II. ORIGINS OF THE REASONABLENESS REQUIREMENT

The requirement that the representee's reliance must be reasonable before an estoppel will arise could be said to have been implicit in the very earliest estoppel cases at common law and in equity.[13] The requirement only emerged as an express requirement, however, in the common law estoppel cases in the middle of the 19th century, as a means of softening the requirement that the representor must intend reliance. The first clear articulation of the reasonableness requirement was in the judgment of the Court of Exchequer Chamber in *Freeman v Cooke*,[14] where Parke B qualified Lord Dennman CJ's statement in *Pickard v Sears*[15] that the representor must 'wilfully' induce the representee's assumption. Parke B suggested that reasonableness of reliance on the part of the representee was an adequate substitute for an intention to induce reliance on the part of the representor. It was, he said, sufficient if the representor conducted himself so that a reasonable man would take the representation to be true and believe he was meant to act upon it as true.[16]

The representee's failure to fulfil the reasonableness requirement was in fact one of the principal reasons for the failure of the defendant's plea of estoppel in *Freeman v Cooke*. The plaintiffs in that case were the assignees of a bankrupt, William Broadbent, who brought an action in trover against a sheriff in connection with the seizure of goods under a writ of *fieri facias*. The relevant issue was whether an estoppel arose to prevent William Broadbent from asserting his ownership of the goods, since he had represented to the sheriff's officers that the goods were owned by his brother Benjamin. William represented that the

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[13] See, eg, the discussion of *Dann v Spurier*, above n 8.

[14] (1848) 2 Ex 352; 154 ER 652.

[15] (1837) 6 A & E 469; 112 ER 179, 181.

[16] (1848) 2 Ex 352; 154 ER 652, 663:

> By the term "wilfully," however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise to disclose the truth, may often have the same effect.

goods were Benjamin's in the belief that the officers were executing a writ against William himself, but when he found that they were in fact executing a writ against Benjamin, he said the goods were owned by another brother, Joseph. When he found the writ was also against Joseph, William truthfully claimed the goods as his own. The goods were then seized by the sheriff's officers and sold under the writ as the goods of Benjamin.

The Court of Exchequer Chamber overturned the decision of Alderson B at first instance and held that no estoppel *in pais* was made out, and William was entitled to sue in trover. Although the jury found that the sheriff's officers had been induced by the false representation to seize the goods, that was held to be insufficient to establish an estoppel. The Court held that there was no proof that William intended to induce the officers to seize the goods as those of Benjamin, as required by *Pickard v Sears*. If any such intention existed, it was negatived by William's withdrawal of the representation before the seizure took place. 'Nor could it be said that any reasonable man would have seized the goods on the faith of the bankrupt's representation, taken altogether.'[17] The finding of the jury was, therefore, insufficient to invoke the rule, either on the terms enunciated in *Pickard v Sears*, or as expounded in Baron Parke's judgment. Accordingly, it was clear from the judgment that an estoppel *in pais* could be made out in two ways: first, on the basis that the representation in question was made with the intention that it be acted upon by the representee or, secondly, in the absence of such intention, on the basis that it was reasonable in the circumstances for the representee to act upon the representation.

The approach laid down in *Freeman v Cooke* was applied in *Pierson v Altrincham Urban Council.*[18] The appellant in that case represented himself to be the executor of his father's will in discussions with the respondent Council in relation to his father's statutory liability for the cost of certain works. The Council sought to hold the representor liable as executor for the cost of the works even though the Council knew that the Public Trustee was in fact the executor. The

[17] Ibid 657.
[18] (1917) 86 LJ KB 969.

finding of an estoppel by the Court of Quarter Sessions was overturned by three members of the King's Bench Division sitting *in banc* on the basis that, although the representor's conduct had induced reliance, there was no finding that the representor intended the representation to be acted upon, and nor was there a finding that the representee's reliance was reasonable. Viscount Reading CJ was concerned with the reasonableness of the representee's adoption of the relevant assumption: he held that the court should infer an intention that a representation be acted upon where the representee's assumption that a particular state of affairs existed was reasonable. No such inference should, the Chief Justice said, be drawn here.[19] Lush J, on the other hand, was concerned with the reasonableness of the representee's reliance: he held that no estoppel was established on the basis that there was no finding that the representation was made with the intention that it should be acted upon, and no inference that it was reasonably acted upon.[20]

The early text book writers adopted the notion that reasonableness of reliance on the part of the representee was an effective substitute for an intention to induce reliance on the part of the representor. Writing in 1888, Michael Cababé suggested that it was unnecessary that the representor should intend reliance, and that his or her conduct could establish an estoppel if a reasonable outsider looking at the conduct would take the representation to be true, and believe that it was meant that it should be acted upon.[21] The explanation for the rule, according to Cababé, was that a person is taken to intend the ordinary consequences of his or her actions. This, Cababé said, was exemplified by the principle of agency by estoppel, which remains a useful illustration today. It is clear in such cases that the principal does not intend the agent to act in contravention of the powers conferred by the principal, but the estoppel arises from reasonable reliance on the principal's representation that the agent has greater powers than he or she in fact has.[22]

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[19] Ibid 972.
[20] Ibid 973.
[21] Michael Cababé, *The Principles of Estoppel* (1888) 61-4.
[22] Ibid 65.

That approach articulated by Cababé was echoed by Spencer Bower and Turner, who maintained that an intention on the part of the representor that the representation be acted upon was required to establish an estoppel by representation. They suggested, however, that such an intention must generally be inferred from the use of conduct which was of such a nature as to induce a normal person in the circumstances to act as the representee acted.[23] In addition to *Freeman v Cooke* and *Pierson v Altrincham Urban Council*,[24] the approach outlined by Spencer Bower and Turner is also supported by the statement of Lord Esher MR in *Seton, Laing, & Co v Lafone*, that it is not necessary that the representor intended the representee to act in a particular way upon the statement: 'it is enough if it was reasonable, as a matter of business, for the plaintiff to do what he did as a result of his belief in the defendant's statement.'[25]

Although the equity judges did not explicitly require that the representee's reliance be reasonable, Francis Dawson has suggested that the requirement was inherent in the early cases where relied upon representations were made good. The doctrine was made workable, he said, because equity judges carefully defined the sort of conduct in reliance which was to be protected. He suggests that *Maunsell v Hedges*[26] provides 'a particularly good illustration of a representation being couched in such terms that the representee could not be said to have reasonably placed reliance upon it.'[27]

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[23] George Spencer Bower and Sir Alexander Turner, *The Law Relating to Estoppel by Representation* (3rd ed, 1977) 94-5.

[24] (1917) 86 LJ KB 969, 972 (Lord Reading CJ), 973 (Lush J): that an intention to induce reliance may be inferred as a fact if the representation was such as would reasonably have the effect of inducing the representee to believe and act upon it as true.

[25] (1887) 19 QBD 68, 72.

[26] (1854) 4 HLC 1039; 10 ER 769. The representee in that case married in reliance on his uncle's representation that 'my county of Tipperary estate will come to you at my death, unless some unforseen occurrence should taken place'. The House of Lords upheld the decision of the court below that, although the representee had acted on the faith of it, the representation was not capable of giving rise to an enforceable obligation.

[27] Francis Dawson, 'Making Representations Good' (1982) 1 *Canterbury Law Review* 329, 334-5.

The notion of reasonableness was expressly referred to in the Court of Appeal in the equity case of *Low v Bouverie*.[28] First, Bowen LJ held that the representee's interpretation of the language used by the representor must be reasonable. Bowen LJ qualified his statement that the language on which estoppel is founded must be 'precise and unambiguous' by explaining that the language need not be open to only one construction, but must be 'such as will be reasonably understood in a particular sense by the person to whom it is addressed.'[29] On the facts, Bowen LJ found that the representor's language would be reasonably understood as a representation of *his belief* that there were no encumbrances on the property in question other than those disclosed, rather than as an assertion that there were *in fact* no other encumbrances. Similarly, Kay LJ held that where no fraud is alleged, the representee must show 'that the statement was of such a nature that it would have misled any reasonable man'.[30] The representee in *Low v Bouverie* failed to discharge that onus since the 'only fair meaning' which could be attributed to the representor's statements was that the encumbrances disclosed were all the representor was aware of at the time of writing.[31] The approaches of Bowen and Kay LJJ to the question of reasonableness are consistent with the finding of Lindley LJ that the representee 'too hastily inferred' that no encumbrances existed other than those disclosed by the representor.[32]

Although the reasonableness of the representee's adoption of the relevant assumption was called into question in *Pierson v Altrincham Urban Council* and *Low v Bouverie*, Spencer Bower and Turner have asserted that:

> 'It will not lie in the mouth of the representor to say that the representation was one which should not reasonably have been believed by the representee ... the representor cannot offer as a defence the

[28] [1891] 3 Ch 82. The facts of the case were discussed above in Chapter 3.
[29] Ibid 106.
[30] Ibid 113.
[31] Ibid 115.
[32] Ibid 104.

contention that the representee should not have believed his representation, or was negligent in doing so.'[33]

When one looks at the cases on which that statement is based, however, it is clear that the relevant principle is considerably narrower. A more accurate statement of the principle, which is consistent with *Freeman v Cooke*, is that where an express representation is made with the intention that it be acted upon, then the representor cannot avoid the estoppel on the basis that the representee should not reasonably have believed the representation. That principle was first applied by the House of Lords in *Bloomenthal v Ford*,[34] which was followed by Astbury J in *Gresham Life Assurance Society v Crowther*,[35] and by the High Court of Australia in *Western Australian Insurance Co Ltd v Dayton*.[36] In *Bloomenthal v Ford* Lord Halsbury LC made it clear that the principle was limited to situations where a representation was made with the *intention* of inducing reliance.[37] That restriction must necessarily have been accepted by Isaacs ACJ in *Western Australian Insurance Co Ltd v Dayton*, when he quoted with approval the statement of Kay LJ in *Low v Bouverie* that: 'It is essential to show that the statement was of such a nature that it would have misled any reasonable man, and that the plaintiff was misled by it.'[38]

III. THE CONTEMPORARY AUSTRALIAN APPROACH

Despite the explicit consideration of the reasonableness of the representee's reliance in such well known cases as *Freeman v Cooke* and *Low v Bouverie*, the notion of reasonableness traditionally has not played an important role in estoppel cases at common law or in equity.[39] The reasonableness requirement has,

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[33] Above n 23, 96.
[34] [1897] AC 156, 161-2 (Lord Halsbury LC), 168 (Lord Herschell).
[35] [1914] 2 Ch 219, 228.
[36] *Western Australian Insurance Co Ltd v Dayton* (1924) 35 CLR 355, 375-6 (Isaacs ACJ, with whom Gavan Duffy J agreed).
[37] [1897] AC 156, 161-2.
[38] [1891] 3 Ch 82, 113, quoted in *Western Australian Insurance Co Ltd v Dayton* (1924) 35 CLR 355, 375 (Isaacs ACJ).
[39] As Lord Hailsham LC said in *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, 756, the proposition for which *Low v Bouverie* is 'rightly cited as authority' is that the language on which an estoppel is founded must be precise and

however, become far more prominent in the contemporary Australian cases.[40] This increased emphasis on reasonableness may well be the result of the relaxation of other barriers to the establishment of an estoppel. First, the lower threshold requirement of an 'induced assumption' applied in Australia makes it easier to establish the basic elements of an estoppel than if a promise or representation were required. Accordingly, the availability of a plea of estoppel must be limited in another way. A second, and more significant, extension of estoppel in Australia has been the relaxation of the principle that a promissory estoppel can only arise where the parties are in a pre-existing contractual relationship. Since an estoppel based on an assumption as to the representor's future conduct is now available in the absence of a pre-existing legal relationship, a limit must be imposed to ensure that such estoppels do not arise too frequently. In each case, close scrutiny of the reasonableness of the representee's reliance provides a means by which the applicability of a potentially broad principle can be circumscribed.

In *Standard Chartered Bank Aust Ltd v Bank of China*, Giles J observed that the question of reasonableness was 'inherent in reliance, although not always enunciated'.[41] His Honour indicated in that judgment that there were two separate requirements: first, that it must have been reasonable for the representee to adopt the assumption and, secondly, that it must have been reasonable for the representee to take the relevant action in reliance on the assumption.[42] Both

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unambiguous.

[40] In addition to the cases discussed in the text, the reasonableness question appeared to play a role in the rejection of a plea of equitable estoppel by the Full Court of the Supreme Court of Queensland in *Valbairn Pty Ltd v Powprop Pty Ltd* [1991] 1 Qd R 295, 297. The Full Court upheld the finding of the trial judge that no equitable estoppel arose from the appellant's assumption that a lease would be entered into between the parties. The decision appeared to be based in part on the conclusion that 'neither party could reasonably have believed that a lease was likely' given the lack of agreement between the parties on certain crucial matters.

[41] (1991) 23 NSWLR 164, 180.

[42] Ibid 180-1. Giles J referred to questions of 'the reasonableness of the conduct of the representee *in adopting and acting upon* the assumption' (ibid 180, emphasis added) and 'whether the representee *reasonably adopted and relied upon* the representation' (ibid 181, emphasis added). Quite a different requirement was put forward by Jordan CJ in *Franklin v Manufacturers Mutual Insurance Ltd* (1935) 36 SR NSW 76, 82: 'In order that [estoppel by representation] may arise, it is necessary that ... a representation of fact should be made ... in such circumstances that a reasonable man would regard himself as invited to act on it in a particular way.'

requirements find support in the early cases discussed above.[43] The distinction between the two requirements may well be important. The first question involves a consideration of the conduct engaged in by the representor, and the impression it would have on a reasonable person in the representee's situation. The second question involves a consideration of the action taken by the representee, and whether it was reasonable for the representee, having adopted the relevant assumption, to have taken the (ultimately detrimental) action which was taken. It is possible to envisage a situation in which it is reasonable to adopt an assumption, but not to act on it to the extent to which the party claiming the benefit of an estoppel has done. If, for example, one of the parties to a contract indicates to another that he or she does not intend to enforce a particular term of the contract, then it may be reasonable to assume that the term will not be enforced. It may not, however, be reasonable to expend a large amount of money on the basis of that assumption without formally varying the contract.[44]

Recent statements in the High Court support the notion that the reasonableness of the representee's reliance is a relevant consideration in estoppel cases, both at common law and in equity. The failure of the respondents to satisfy the reasonableness requirement was one of the reasons Mason CJ and Wilson J gave in *Waltons Stores (Interstate) Ltd v Maher*[45] for rejecting the respondents' claim to an estoppel based on assumption of existing fact. Even if the respondents could establish that they had assumed that contracts had been exchanged or a binding

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[43] The notion that the representee's assumption must be reasonable is supported by the statement of Bowen LJ in *Low v Bouverie* [1891] 3 Ch 82, 106 that the representor's language 'must be such as will reasonably be understood in a particular sense by the person to whom it is addressed.' That statement was quoted with approval in *George Whitechurch Ltd v Cavanagh & Co* [1902] AC 117, 145 (Lord Brampton); *Canada & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46 (PC). Spencer Bower and Turner, above n 23, 83-4 observe that the *dictum* was subjected to searching re-examination, but ultimately left untouched, by the House of Lords in *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] 2 All ER 271. Spencer Bower and Turner, above n 23, 82-3, suggest that the onus of proof is on a person seeking to set up an estoppel to show 'that the representation was *reasonably* understood by the representee in a sense, whether primary or secondary, materially inconsistent with the allegation against which the estoppel is now set up.' The second requirement is supported by statements of principle in *Freeman v Cooke* (1848) 2 Ex 352; 154 ER 652, 657; *Pierson v Altrincham Urban Council* (1917) 86 LJ KB 969, 972 & 973; *Seton, Laing, & Co v Lafone* (1887) 19 QBD 68, 72.

[44] Cf *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, 106-107 (Robert Goff J).

[45] (1988) 164 CLR 387 (*'Waltons Stores'*).

contract had come into existence, such a belief 'could scarcely be described as a reasonable belief' in the absence of confirmation from their solicitors.[46] Mason CJ and Wilson J also observed in *obiter dictum* that a voluntary promise was generally unenforceable because the promisee may reasonably be expected to appreciate that a promise will only be binding if it forms part of a contract.[47] Although a reasonableness requirement was not discussed in any detail in *Commonwealth v Verwayen*, Mason CJ noted that the assumption adopted by Verwayen was a reasonable assumption for a person in his position to make, since the circumstances pointed to the existence of a definitive government policy which had been followed to the point of judgment on other occasions.[48] The relevance of that observation was, however, restricted to the question whether there was reason to doubt the veracity of Verwayen's assertions as to his adoption of, and reliance upon, the relevant assumption.

The existence of a reasonableness requirement in Australian law was confirmed when it formed the basis of the High Court's rejection of a plea of estoppel in *Australian Securities Commission v Marlborough Gold Mines Ltd.*[49] The decision is important for two reasons. First, the reasonableness requirement has never before formed the basis of a decision of the High Court on estoppel.[50] Secondly, the approach taken by the Court lends support to the notion that the 'reasonableness of reliance' approach is to be followed in Australia, rather than

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[46] Ibid 397. The facts of the case were discussed in Chapter 3 above. While Mason CJ and Wilson J regarded it as unreasonable for the respondents to believe that contracts *had* been exchanged, they did see it as reasonable for the respondents to assume that contracts *would* be exchanged. 'This assumption was a reasonable assumption because the terms of [a letter from the appellant's solicitors] coupled with the failure to communicate any refusal by the appellant to agree to the amendments justified the inference that the appellant agreed to the amendments with the result that exchange would follow as a matter of course.' (Ibid). Thus, while a common law estoppel could not arise from any assumption of existing fact made by the respondents, an equitable estoppel did arise from the respondents' assumption relating to the appellants' future conduct.

[47] Ibid 403. This statement is discussed further below, n 114.

[48] (1990) 170 CLR 394, 414 ('*Verwayen*').

[49] (1993) 177 CLR 485, 506 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ) ('*ASC v Marlborough Gold Mines*').

[50] As discussed in Chapter 3 above, the High Court's rejection of the plea of estoppel in *Legione v Hateley* (1983) 152 CLR 406 could have been based on a finding that the representee did not act reasonably in adopting and acting upon the relevant assumption, but instead was based on the failure to meet a strict threshold requirement. That is, that no clear and unequivocal representation was made on behalf of the representor: ibid 440 (Mason and Deane JJ).

the 'reasonable expectation of reliance' approach which is taken in the United States.[51] The relevant issue in that case was whether 'an equitable estoppel of the kind upheld in *Verwayen*'[52] arose where the Australian Securities Commission, having indicated by letter that it would not oppose an application for court approval of a scheme of arrangement under s 411 of the Corporations Law, subsequently sought to oppose the application. The attitude of the Commission changed when it became aware of a decision of the Full Federal Court which indicated that the Corporations Law did not authorise the approval of the arrangement, which involved the conversion of a limited liability company to a no liability company. In those circumstances, the High Court held that the Commission's departure from the position it had originally taken was neither 'unjust' nor 'unconscionable' to use the expressions found in *Thompson v Palmer*[53] and *Verwayen*,[54] because '[i]t would have been unreasonable for the Company to assume that the Commission would continue to maintain the same attitude once the [Full Federal Court's] interpretation of the [Corporations] Law came to its attention.'[55] Accordingly, the decision in *ASC v Marlborough Gold Mines Ltd* seems to be based on the principle that it is not unconscionable for a representor to depart from an assumption in circumstances in which it was unreasonable for the representee to adopt that assumption. The decision therefore raises the important philosophical question of the connection between the reasonableness requirement and the unconscionability of the representor's departure from the relevant assumption. That question is taken up below.

A final point to note about the application of the reasonableness requirement in Australian law is that, in *W v G*, Hodgson J suggested that it was not necessary for a representee to establish affirmatively that his or her conduct was reasonable

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[51] The Restatement of Contracts (2d), s 90(1) provides that:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

[52] (1993) 177 CLR 485, 506 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).
[53] (1933) 49 CLR 507, 547.
[54] (1990) 170 CLR 394, 410-1 (Mason CJ), 429 (Brennan J), 436 and 440-1 (Deane J), 453-4 (Dawson J), 500-1 (McHugh J).
[55] (1993) 177 CLR 485, 506.

or for a judge to make a positive finding that the representee's reliance was reasonable:

> I do not understand it to be an independent part of the plaintiff's cause of action that she establish that her reliance was reasonable and I do not consider it necessary for me to make a positive finding that the plaintiff's conduct was reasonable. However, I do not consider that there was any such element of unreasonableness as to prejudice the finding that there was reliance and this was intended by the defendant.[56]

Those remarks are interesting for two reasons. First, since reasonableness seems clearly to be a policy question, rather than a factual question, Hodgson J must certainly be right to say that it is not an independent part of the plaintiff's cause of action. Secondly, it is rare to see a modern judgment in which the question of reasonableness is linked with the representor's intention, as Hodgson J did in the last sentence of the above passage. Hodgson J appears to be alluding to the approach taken in *Pierson v Altrincham Urban Council*, where the reasonableness of the representee's reliance was regarded as a basis on which the representor's intention to induce reliance could be established. In the other contemporary Australian cases in which the reasonableness question has arisen, it appears to have lost its tenuous connection with the question of the representor's intention to induce reliance.

IV. REASONABLENESS AND THE PHILOSOPHY OF ESTOPPEL

A. *Reasonableness and Unconscionability*

The connection between the reasonableness of the representee's reliance and unconscionability which emerged from the joint judgment in *ASC v Marlborough Gold Mines Ltd* was also emphasised by Deane J in *Verwayen*:

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[56] (1996) 20 Fam LR 49, 66.

> Ultimately, however, the question whether departure from the assumption would be unconscionable must be resolved ... by reference to all of the circumstances of the case, including the reasonableness of the conduct of the other party in acting upon the assumption.[57]

From a philosophical point of view, the judgment of Deane J in *Verwayen* and the joint judgment in *ASC v Marlborough Gold Mines Ltd* indicate that the reasonableness requirement is justified on the basis of unconscionability and is, therefore, consistent with the notion that estoppels are conscience-based doctrines. An inquiry into the reasonableness of the representee's reliance is not, however, a good indicator of whether departure from the assumption in question would offend the conscience of the representor. The reasonbleness test adopted the United States, whether a reasonable person in the position of the representor would have expected reliance upon the relevant assumption, is more directly concerned, although in an objective way, with the representor's conscience. A 'reasonable expectation' inquiry would seem to have more bearing on the question whether it was or would be unconscionable for the representor to depart from that assumption, and would seem to be more consistent with the notion that estoppels are conscience-based doctrines.

B. *Reasonable Expectation of Reliance*

In the United States, s 90 of the Restatement of Contracts (2d) provides that a voluntary promise is binding only if the promisor should reasonably expect the promise to induce action or forbearance on the part of the promisee.[58] The focus on the reasonable expectations of the promisor tends to indicate that s 90 is more concerned with the position of the promisor than with that of the promisee. As discussed in Chapter 2, the primary focus of a doctrine of estoppel which is 'founded upon good conscience'[59] should be on the knowledge and conduct of the representor, whereas a doctrine based on reliance should primarily direct

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[57] (1990) 170 CLR 394, 445.
[58] See above, n 51.
[59] *Verwayen* (1990) 170 CLR 394, 440 (Deane J).

attention to the representee. Indeed, in *Waltons Stores*, Mason CJ and Wilson J examined the reasonable expectation requirement of s 90 and observed that the requirement 'makes it clear that the promise is enforced in circumstances where departure from it is unconscionable'.[60]

The focus on the promisor under s 90 can be contrasted with the requirement in Australia that reliance by the representee on the relevant assumption must be reasonable. In each case the state of mind, or the interpretation of events, of one of the parties is tested against objective standards; in Australia it is the state of mind of the representee and in the United States it is the state of mind of the representor. As Michael Metzger and Michael Phillips have suggested, under s 90 'foreseeability is tested from the viewpoint of the promisor, in light of all of the circumstances as they were known to him.'[61] It is interesting to note that one American commentator, Melvin Eisenberg, has criticised the s 90 requirement that the promisor should reasonably expect reliance, and has advocated its replacement with a requirement that the representee's reliance be reasonable.[62] Eisenberg has proposed that change on the ground that the reasonable reliance requirement:

> is cleaner, does not embody a questionable distinction between donative promises as a class and those on which reliance can reasonably be expected, and properly focuses attention on the reasonableness of the innocent promisee's reliance rather than on the contours of the promise breaker's expectation.[63]

Eisenberg does not explain why he regards a focus on the promisee's reliance as preferable to a consideration of the promise breaker's expectation. Certainly it is preferable if one regards the purpose of a doctrine of estoppel as the prevention of harm resulting from reliance on the conduct of others, rather than the prevention

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[60] (1988) 164 CLR 387, 402.
[61] Michael Metzger and Michael Phillips, 'The Emergence of Promissory Estoppel as an Independent Theory of Recovery' (1983) 35 *Rutgers Law Review* 472, 539.
[62] Melvin Eisenberg 'Donative Promises' (1979) 47 *University of Chicago Law Review* 1, 20-2.
[63] Ibid 22.

of unconscionable conduct. The distinction between the two requirements has considerable significance in highlighting the fact that s 90, as presently drafted, does not have the protection of reliance as its primary goal, as Yorio and Thel make clear:

> If the objective of Section 90 is to protect reliance, then reasonable reliance alone justifies a remedy. But if ... the goal of Section 90 is to enforce certain non-bargain promises, it is critical to provide standards for determining which promises should be enforced.[64]

The contrast between a conscience-based doctrine and a requirement that complainants act reasonably was clearly appreciated by Paul Finn, when he suggested that more attention should be paid to the question whether complainants have taken reasonable steps to protect their own interests:

> Unconscionability based doctrines are now being used to thwart exploitative conduct. But, as their reach is extended, we must inevitably confront the question of the level of responsibility a complainant must have to take reasonable steps to protect his or her own interests or else suffer the consequences of a failure to do so.[65]

The Australian 'reasonableness of reliance' requirement ensures that estoppel only protects reasonable reliance, and only protects against detriment suffered as a result of reasonable changes of position. It is an objective test which focuses on the matrix of circumstances as seen from the perspective of a reasonable person in the position of the party claiming the benefit of the estoppel. Both it and the 'reasonable expectation' test applied in the United States serve to limit the circumstances in which an estoppel claim will be available, but the American test is based on conscience, while the Australian test is based on reliance.

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[64] Edward Yorio and Steve Thel, 'The Promissory Basis of Section 90' (1991) 101 *Yale Law Journal* 111, 124.
[65] Paul Finn, 'Unconscionable Conduct' (1994) 8 *Journal of Contract Law* 37, 45.

C. *Reasonable Expectation of Reliance in Anglo-Australian Law*

The 'reasonable expectation' and 'reasonable reliance' requirements can be seen as alternatives, since each provides an objective test which limits the circumstances in which a plea of estoppel can be made. Although the reasonableness of reliance approach has been favoured, there is some support for the reasonable expectation of reliance test in Anglo-Australian law.[66] In *Jorden v Money*, Lord Cranworth LC indicated that, where an 'intention to mislead' is absent, then the representor must reasonably expect reliance:

> But if the party has unwittingly misled another, you must add that he has misled another under such circumstances that he had reasonable ground for supposing that the person whom he was misleading was to act upon what he was saying.[67]

Earlier, Lord Cranworth VC had said in *West v Jones*[68] that a representor will be bound by a statement 'if it be made in order to induce another to act upon it, or under circumstances in which the party making it may reasonably suppose it will be acted on.' More recently, statements in the High Court have indicated that a reasonable expectation of reliance may be relevant to the question of unconscionability. That argument finds support in the *dictum* of Mason CJ and Wilson J in *Waltons Stores* that the requisite unconscionability can be found in the representor's reasonable expectation of detrimental reliance by the representee.[69] In *Verwayen*, Deane J said that a critical consideration in determining whether departure from an assumption would be unconscionable 'will commonly be that the allegedly estopped party knew or intended *or clearly*

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[66] PS Atiyah, 'Misrepresentation, Warranty and Estoppel' (1971) 9 *Alberta Law Review* 347, 380, also suggests that the reasonable expectation of reliance requirement is part of English law, but cites no authority for the proposition.

[67] (1854) 5 HLC 185; 10 ER 868, 881. This can be contrasted with the approach taken in *Freeman v Cooke* (1848) 2 Ex 252; 154 ER 652 and *Pierson v Altrincham Urban District Council* (1917) 86 KB 969. In each of those cases the relevant consideration was whether reliance by the representee was reasonable (not whether it was reasonably to be expected) if the representor did not intend reliance.

[68] (1851) 1 Sim (NS) 205; 61 ER 79, 81.

[69] (1988) 164 CLR 387, 406.

ought to have known that the other party would be induced by his conduct to adopt, and act on the basis of, the assumption'.[70]

In a recent article, Sir Anthony Mason also indicated that the 'reasonable expectation' requirement may have a role to play in Australian law. Sir Anthony suggested that the concept of unconscionability, which is at the heart of estoppel, may have its origin in, *inter alia*, 'the reasonable expectation on the part of the promisor that the promise will induce action or forbearance in circumstances where injustice can only be avoided by holding the promisor to the promise.'[71] Although the question has not been addressed squarely by the courts, the reasonableness of the representee's reliance does appear to have been treated in the cases to date as the principal limit on the availability of an estoppel. If the reasonable expectation of reliance approach does have a role to play in Australian law, then it is as a means of satisfying the unconscionability requirement: that is, the requirement that it must be unconscionable in the circumstances for the representor to depart from the relevant assumption. If the circumstances are such that the representor should reasonably expect reliance by the representee, then that fact may render it unconscionable for the representor to depart from the assumption.[72]

Although Melvin Eisenberg saw the reasonable expectation of reliance and the reasonableness of reliance requirement as alternatives, one of the comments to s 90 indicates that the reasonableness of the promisee's reliance is a relevant question for the United States courts. Section 90 insists that a relied-upon promise is only binding 'if injustice can be avoided only by enforcement of the promise.' Comment b to s 90 notes that whether enforcement of the promise is necessary to avoid injustice may depend, *inter alia*, 'on the reasonableness of the promisee's reliance'. Michael Metzger and Michael Phillips have observed that while some courts have, in accordance with comment b, treated the reasonableness of the promisee's reliance as a factor to be taken into account

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[70] (1990) 170 CLR 394, 445 (emphasis added).
[71] Sir Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238, 254.

under the broad 'injustice' heading,[73] other courts have gone further and treated the reasonableness of the promisee's reliance as a separate element of promissory estoppel.[74] It appears that the two requirements may operate side by side, at least in some states.[75] Larry Di Matteo has suggested that s 90 'filters reliance recovery through the prism of the reasonable person in the position of the promisee and the promisor'. The reasonable person is, he says, called upon to determine whether the promisee's reliance was reasonable, and whether it was foreseeable by a reasonable person in the position of the promisor.[76]

Similarly, the reasonableness of reliance requirements and reasonable expectation of reliance requirements may in certain cases be applied side by side in Australia. In Chapter 6, I will argue that, in cases of estoppel by silence, the representor's departure from an induced assumption can only be regarded as unconscionable where the representor had knowledge of the representee's reliance. If the courts are prepared to accept constructive knowledge of reliance for that purpose, then such an approach is virtually indistinguishable from a requirement that the representor must reasonably expect reliance in order for an estoppel to arise from silence on the part of the representor. If that is accepted, then we have in effect two reasonableness requirements in Australian estoppel: in all cases the representee must reasonably adopt and reasonably rely upon the relevant assumption. Where the representor has not induced the assumption by positive

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[72] See Chapter 6 below.

[73] This refers to the stipulation in s 90 that a relevant promise 'is binding if injustice can be avoided only by enforcement of the promise.'

[74] Michael Metzger and Michael Phillips, 'The Emergence of Promissory Estoppel as an Independent Theory of Recovery' (1983) 35 *Rutgers Law Review* 472, 541-2.

[75] Joseph Weinstein, 'Promissory Estoppel in Washington' (1980) 55 *Washington Law Review* 795, 805 (n 66), has identified both foreseeable reliance (a reasonable expectation of reliance) and justifiable reliance (reasonable reliance) requirements applied by the Washington courts, although he notes that some formulations of the doctrine require only foreseeable reliance. Eric Holmes, 'Restatement of Promissory Estoppel' (1996) 32 *Williamette Law Review* 263, 288-9, has suggested that reasonable reliance is required in jurisdictions in which promissory estoppel is at the tort stage of development, at which courts recognise a promisor's duty to prevent reasonable, and reasonably foreseeable, detrimental reliance. As noted in Chapter 2, this is the third of four stages in the development of promissory estoppel identified by Holmes: the estoppel phase (in which promissory estoppel has a preclusionary operation), the contract phase (in which promissory estoppel operates as a consideration substitute), the tort phase (in which both liability and remedy turn on reliance) and the equity phase (in which courts apply promissory estoppel as a flexible, characteristically equitable doctrine).

[76] DiMatteo, above n 3, 303.

conduct, then it is also required that the representor must reasonably expect reliance before an estoppel can arise.[77]

D. *Reasonableness as a Common Law Concept*

As well as revealing the orientation of both common law and equitable estoppel towards a concern with reliance, rather than conscience, the fact that the 'reasonableness' requirement is applied in equitable estoppel cases is also evidence of the infiltration of common law concepts into equitable estoppel. In other words, it reveals the extent to which the merger of common law and equitable estoppel has already begun. Prior to *Waltons Stores*, Paul Finn wrote that:

> Outside of cases of invitation, authorisation or encouragement, the finding of a responsibility in the representor for the representee's actions inevitably raises questions of the "reasonable" - if only because reliance of itself could not be allowed as of course to found liability. But once one begins to ask such questions as: should the representor have reasonably anticipated reliance? was the reliant action itself reasonable? then one has moved beyond the province of equity, no matter how elastic one's conception of "fraud", of "unconscionability".[78]

Finn went on to say that if we are to aspire to a jurisdiction giving qualified enforcement to voluntary promises, then some fusion of common law and equitable concepts is inevitable.[79] It is clear that the reasonableness requirement had its origin in the common law estoppel cases, although as long ago as 1891 the Court of Appeal was prepared to consider questions of reasonableness in an equity case.[80] As Finn has suggested, however, the importation of common law concepts such as reasonableness has been an essential part of the development of a broad jurisdiction which protects reliance on the conduct of others. Although

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[77] See Chapter 6 below.
[78] PD Finn, 'Equity and Contract' in PD Finn (ed), *Essays on Contract* (1987) 104, 119.
[79] Ibid.

the common law and equitable compartments of that jurisdiction are notionally separate, it is clear from the borrowing of the concept of reasonableness that some substantive unification has already taken place.

V. MANIFESTATIONS OF THE REASONABLENESS REQUIREMENT

There are two ways in which the reasonableness requirements have, or can be argued to have, manifested themselves in recent cases and a third situation in which the reasonableness requirement may be of considerable practical importance. First, the reasonableness requirement was found by Giles J in *Standard Chartered Bank v Bank of China* to subsume any question of the defeat of an estoppel by constructive notice.[81] Secondly, the reasonableness requirement may provide a justification for the courts' reluctance to find estoppels arising during negotiations between well-advised commercial parties. Thirdly, the question of reasonableness may be important in preventing estoppels from arising between strangers, without the need to define the types of relationship in which an estoppel can arise.

A. *Constructive Notice*

In *Standard Chartered Bank v Bank of China*, Giles J observed that the cases 'do not show much support for a doctrine of constructive notice operating to defeat an estoppel.'[82] Where a person claiming the benefit of an estoppel was aware of facts which should have caused him or her to suspect the accuracy of the relevant representation, then, according to Giles J, it is preferable not to ask whether the promisee has constructive notice that the representation is untrue. Rather, account should be taken of the promisee's actual knowledge in asking whether he or she reasonably adopted and relied upon the representation.[83] The plaintiff in that case had lent money on the faith of a forged letter of credit purportedly issued by the Hong Kong branch of the defendant. After receiving the letter of credit, and

[80] *Low v Bouverie* [1891] 3 Ch 82.
[81] (1991) 23 NSWLR 164.
[82] Ibid 180.

before agreeing to lend the money, the plaintiff asked the Sydney branch of the defendant to verify the signatures on the letter of credit. Officers in the defendant's Sydney branch verified the signatures by conduct which, Giles J held, amounted to a representation that the letter of credit was authentic. The plaintiff then lent the money, which it later sought to recover under the terms of the letter of credit. The principal issue before Giles J was whether the defendant was estopped by its conduct from denying that the letter of credit was authentic, and was therefore liable to make payment according to its terms.

The defendant argued that the plaintiff could not claim the benefit of an estoppel because it had been put on notice that the letter of credit was a forgery. Three facts were claimed to have put the plaintiff on notice. First, an earlier draft copy of the letter of credit sent to the plaintiff by facsimile was signed and dated two days after the transmission, and was accompanied by a confirmatory letter which was dated five days thereafter. Those features of the transaction were said to be 'unheard of' in such dealings. Secondly, where the issuing bank and the beneficiary of a letter of credit were not in a correspondent relationship, the issuing bank could be expected to use an advising bank to convey the letter of credit to the beneficiary, which did not occur. Thirdly, the plaintiff had issued warning bulletins to its staff stating that forged Bank of China letters of credit had been reported.

Giles J noted that actual knowledge that a representation is untrue will defeat an estoppel 'because the representee cannot be found to have reasonably adopted and acted in reliance upon the truth of the representation.'[84] Accordingly, he said, all knowledge which the representee possesses should be treated it the same way:

> 'the preferable approach is to take account of the representee's actual knowledge in asking whether the representee reasonably adopted and

[83] Ibid 181.
[84] Ibid 180-1.

relied upon the representation, rather than ask whether the representee had constructive notice that the representation was untrue.'[85]

On the facts, Giles J found that the unusual circumstances known to the plaintiff did not make it unreasonable for the plaintiff to rely on the representation.[86] Accordingly, an estoppel arose which prevented the defendant from denying the authenticity of the letter of credit, and allowed the plaintiff to enforce it against the defendant.

Ultimately, the answer to the two questions, whether the known facts made it unreasonable to adopt the assumption, and whether the representee had constructive notice of the falsity of the representation, should be the same. In each case, the promisee's conduct is tested against objective standards. If the issue was whether the promisee had constructive notice of the untruth, the relevant question would be whether, given what was actually known, a reasonable person in that position would have conducted further inquires.[87] It is difficult to see how the result would be any different if the relevant question was whether a reasonable person in that position would have adopted the relevant assumption. In each case all of the circumstances would be taken into account to determine whether a reasonable person would have adopted the assumption in question as the basis of action.

The approach taken by Giles J does, however, have the benefit of involving a principle long acknowledged as one by which an estoppel can be defeated. It also sits more comfortably with the approach of the High Court towards the simplification of estoppel doctrine. The reasonableness requirement is clearly sufficiently broad to obviate the need for a separate question of constructive notice, and can be applied consistently at common law and in equity. The reasonableness of reliance test is also a more sophisticated test than the constructive notice test because it is not just concerned with the circumstances of

[85] Ibid 181.
[86] Ibid.
[87] See, for example, RP Meagher, WMC Gummow and JRF Lehane, *Equity: Doctrines and*

reliance, but also the nature and extent of reliance. In other words, a constructive notice question equates to only half of the reasonableness test, namely the reasonableness of the adoption of the relevant assumption, and does not take account of the second part of the reasonableness test: the reasonableness of the action taken in reliance on that assumption.

B. *Well-Advised Commercial Parties*

The reluctance of courts to uphold pleas of estoppel by well advised commercial parties can also be seen as a manifestation of the reasonableness requirement.[88] Although the connection has not been articulated in the way in which Giles J linked constructive notice and the reasonableness requirement, the connection was adverted to by Mason CJ and Wilson J in *Waltons Stores*. After referring to the 'problem identified in *Texas Bank*[89] that a voluntary promise will not generally give rise to an estoppel because the promisee may reasonably be expected to appreciate that he cannot safely rely on it', they went on to say that '[t]his problem is magnified in the present case where the parties were represented by their solicitors.'[90] The problem of well advised commercial parties was also discussed by Kirby P in *Austotel Pty Ltd v Franklins Selfserve Pty Ltd*,[91] although not in the context of the reasonableness requirement. Kirby P observed in that case that where '[t]he Court has before it two groupings of substantial commercial enterprises, well resourced and advised, dealing in a commercial transaction having a great value' then that was a reason 'for scrutinising carefully the circumstances which are said to give rise to the conclusion that an insistence by the appellants on their legal rights would be so unconscionable that the Court will provide relief from it.'[92] Rather than being dealt with on the basis of unconscionability, such considerations could be taken into account in considering whether the representee's reliance was reasonable in the circumstances.

Remedies (3rd ed, 1992) 253.

[88] Alec Leopold, 'Estoppel: A Practical Appraisal of Recent Developments' (1991) 7 *Australian Bar Review* 47, 63-4.

[89] *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, 107.

[90] (1988) 164 CLR 387, 406.

[91] (1989) 16 NSWLR 582, 584-6.

When an estoppel is claimed to have arisen in the course of a commercial transaction, then the nature of the transaction and the availability of legal advice are clearly circumstances a court should take into account in determining whether it was reasonable for the representee to adopt the relevant assumption, and to take the relevant detrimental action in reliance on that assumption.[93] Obviously the nature of an assumption will have considerable bearing on the reasonableness of making it, and acting upon it, when legal advice is available. On the one hand, it may be reasonable for a well-advised party to make an assumption as to a fact underlying a transaction or as to the intentions of the other party in relation to the transaction. It is worthy of note that, in all four of the recent decisions in which claims of estoppel were upheld by members of the High Court,[94] the party claiming the benefit of the estoppel was advised by solicitors both at the time of making the relevant assumption, and at the time of acting on it. On the other hand, it is difficult to envisage circumstances in which it would be reasonable for such a party to make, and act to their detriment on, an assumption as to the legal effect of a transaction. Had the applicants in *Re Ferdinando*,[95] for example, had the benefit of independent legal advice, then it would presumably have been unreasonable for them to have assumed that the financial obligations secured by the mortgage given by them were limited in the way represented to them by the mortgagee.[96]

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[92] Ibid 585.

[93] Justine Munro, 'The New Law of Estoppel' (1993) 23 *Victoria University of Wellington Law Review* 271, 288 has suggested that the courts should 'adjust their judgments concerning responsibility commensurate with the positions of the parties, be they substantial commercial enterprises or vulnerable individuals.' While the question of reasonableness clearly requires the court to take into account the circumstances of reliance, the cases do not support the proposition that the courts should impose different standards of responsibility for different parties.

[94] *Legione v Hateley* (1983) 152 CLR 406; *Waltons Stores* (1988) 164 CLR 387; *Foran v Wight* (1989) 168 CLR 385; *Verwayen* (1990) 170 CLR 394.

[95] *Re Ferdinando; Ex parte Australia and New Zealand Banking Group Limited v The Official Trustee in Bankruptcy (as Trustee of the bankrupt estate of Maurice Christie Ferdinando)* (1993) 42 FCR 243. The representor bank induced the representee guarantors to believe that the guarantee they were providing for the debts of their company was not linked to an 'all moneys' mortgage they had previously given to secure other debts. See Andrew Robertson, 'Limits on the Recovery of Secured Debts: Estoppel and Section 52' (1994) 5 *Journal of Banking and Finance Law and Practice* 211.

[96] The availability of legal advice could also, as Deane J indicated in *Waltons Stores* (1988) 164 CLR 387, 444, prevent the promisor's conduct from being the proximate cause of the promisee adopting and acting upon the assumption.

C. *Estoppels Between Strangers*

A third situation in which the reasonableness requirement may be important is in preventing estoppels from arising between strangers. In *Waltons Stores*, the High Court relaxed the rule that a promissory estoppel could only arise between contracting parties: 'a pre-existing contractual relationship was held not to be a prerequisite to the application of the doctrine of promissory estoppel.'[97] Despite the paucity of explicit discussion of the issue in the judgments, on its facts the case provides authority for the proposition that promissory estoppel can arise in the absence of a pre-existing legal relationship.[98] If any pre-existing relationship was required, then that between parties involved in pre-contractual negotiations was sufficient. Mason CJ and Wilson J expressed the opinion that the doctrine could operate in circumstances where a person attempts to depart from a representation that he or she would not enforce a non-contractual right.[99] They did not, however, consider whether a promissory estoppel could arise so as to create rights between parties who were not in a pre-existing legal relationship of any kind.[100] Brennan J, on the other hand, indicated that there could be no limit on the availability of a plea of promissory estoppel if it was seen to based on the same equity as proprietary estoppel. The enforcement of promises to create new

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[97] *Verwayen* (1990) 170 CLR 394, 455 (Dawson J). The question whether promissory estoppel could apply outside a pre-existing contractual relationship had explicitly been left open in *Legione v Hateley* (1983) 152 CLR 406, 435 (Mason and Deane JJ).

[98] Leopold, above n 88, 65.

[99] (1988) 164 CLR 387, 399.

[100] The New Zealand Court of Appeal has gone a step closer to recognising that an equitable estoppel can arise between strangers. In *Burbery Mortgage Finance & Savings Ltd v Hindsbank Holdings Ltd* [1989] 1 NZLR 356, the Court of Appeal held that an equitable estoppel arose between parties whose only relationship was that they had interests in the same subject matter. The representee refrained from taking possession of farm machinery over which it held security on the faith of an assurance, given by a receiver appointed by a mortgagee of the farm land on which it was situated, that the machinery would be used only to assist in the sale of the farm. The receiver subsequently discovered that he had a right of distress against the chattels for unpaid rent. The Court of Appeal held that an equitable estoppel arose which prevented the receiver from distraining against the chattels without first giving the representee the opportunity of resuming its former position. At common law, estoppels commonly arise between parties connected only by virtue of having an interest in the same subject matter: see, eg, *Thomas Australia Wholesale Vehicle Trading Co Pty Ltd v Marac Finance Australia Ltd* [1985] 3 NSWLR 452.

proprietary rights could not, he said, be reconciled with a limitation on the enforcement of other promises under the rubric of promissory estoppel.[101]

In *Verwayen*, Dawson J regarded as unresolved the question whether a pre-existing *legal* relationship was required before a promissory estoppel could arise, but held the relationship between litigating parties to be sufficient for this purpose. As Dawson J noted, while the parties were not in a contractual relationship, they 'were in a legal relationship which began at least with the commencement of the action' by Mr Verwayen against the Commonwealth.[102] There was, he said, no reason why an estoppel could not arise where the legal relationship between the parties was a non-contractual one.[103] The estoppel that arose in *Verwayen* was in sense quite conventional, since it arose to prevent the Commonwealth from exercising pre-existing rights which the Commonwealth's representatives had promised not to exercise. *W v G*, on the other hand, involved an innovative use of the doctrine, since the estoppel itself provided a source of rights where none existed before.[104] The parties in *W v G* were, however, in a pre-existing relationship as co-habitees. The question that remains, then, is whether a representee must be able to establish a legal relationship between the parties, or whether an estoppel can potentially arise between parties who are not in any sort of legal relationship. It seems from the remarks made by Brennan J in *Waltons Stores* quoted above, and from the broad terms in which the doctrines of equitable estoppel were described in *Waltons Stores* and *Verwayen*, that the better view must be that no particular type of pre-existing relationship is required. This view is supported by the decision in *Lee Gleeson Pty Ltd v Sterling Estates Pty Ltd.*[105]

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[101] (1988) 164 CLR 387, 426:

> If it be unconscionable for an owner of property in certain circumstances to fail to fulfil a non-contractual promise that he will convey an interest in the property to another, is there any reason in principle why it is not unconscionable in similar circumstances to fail to fulfil a non-contractual promise that he will confer a non-proprietary legal right on another? It does not accord with principle to hold that equity, in seeking to avoid detriment occasioned by unconscionable conduct, can give relief in some cases but not in others.

[102] (1990) 170 CLR 394, 455.

[103] Ibid.

[104] (1996) 20 Fam LR 49. The facts of the case were discussed in Chapter 1 above.

[105] (1991) 23 NSWLR 571 ('*Lee Gleeson*'). As noted in Chapter 1, equitable estoppel provided

The question of reasonableness is an appropriate means, and perhaps the only means, by which a relationship between the parties can be required, while retaining sufficient flexibility in the doctrine to account for the decisions in *Waltons Stores*, *Verwayen*, *W v G* and *Lee Gleeson*. The relationship between the parties should be a crucial factor in determining whether it is reasonable to adopt and rely upon an assumption on the basis of the conduct of another.[106] Where the pre-existing relationship between the parties is tenuous, then it will be less likely that any substantial action on the faith of the assumption would be regarded as reasonable.[107] Assume, for example, that A feels that B needs a holiday, and promises to give her $5000 the following day to pay for it. On the faith of that promise, B books and incurs liability for a holiday she can not afford. If A and B were merely acquaintances, then no estoppel would arise because, even if it were considered reasonable for B to assume that the money would be paid, it would certainly not be reasonable for B to incur expenditure on the faith of that assumption. If, on the other hand, A was a close friend of B's, was very wealthy, and was in the habit of giving extravagant gifts to B, then the situation may well be different. Although A and B are not in any sort of legal relationship, even such as existed in *Waltons Stores*, *Verwayen* or *W v G*, it may well be reasonable in the circumstances for B to assume the gift will be made and to incur expenditure on the faith of it.[108]

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a cause of action which enabled the enforcement of a gratuitous promise made by a bank to a person with whom it was not in a contractual relationship. The representee was a builder who completed certain building works for a property owner in financial difficulties on the faith of a promise that the builder would be paid by the owner's bank from the sale proceeds of the property. Brownie J held that an equitable estoppel arose against the bank, the effect of which was to prevent the bank from denying the existence or the binding quality of its representation to the builder.

[106] The reasonableness of the representee's reliance was unsuccessfully challenged by the representor in *W v G*, ibid 66, on the basis that it was highly unlikely the relationship between the parties would endure.

[107] Michael Spence, 'Australian Estoppel and the Protection of Reliance' (1997) 11 *Journal of Contract Law* 203, 206-7 & 216-7 also sees the length of the relationship between the parties as relevant to the establishment of an estoppel, although he sees it as one of the criteria for determining whether the unconscionability requirement has been satisfied.

[108] The example of an estoppel arising from reliance on a promise to fund an overseas trip was used by Joseph Weinstein, above n 75, 810, who observed that the reasonableness of reliance will depend on the sincerity of the promise and the setting in which it was made, as well as the relationship between the parties.

VI. CRITICISM OF THE REASONABLENESS TEST

Whether the reasonableness question is considered from the point of view of the representor (the reasonable expectation of reliance test) or from the point of view of the representee (the reasonableness of reliance test), it is clear that reasonableness is an important aspect of any source of legal obligation which depends on reliance on the unintentional conduct of others. Randy Barnett has criticised reliance as a basis for imposing promissory obligations, on the basis that a focus on reliance does not present us with a clear choice as to which promises should be enforced.[109] He draws on Morris Cohen's comment that not all cases of reliance on the words or conduct of another are actionable, and reliance theory offers no clue as to what distinguishes those that are enforceable from those that are not.[110] The way in which actionable reliance is distinguished from non-actionable reliance is by reference to the question whether the representee's reliance was, in the circumstances, reasonable. Equitable estoppel in Australia, for example, can potentially operate in all cases in which one person has relied on a promise made by a second person, where that second person subsequently seeks to resile from the promise. An estoppel will only arise, however, where that reliance is reasonable.

Barnett suggests that the reasonableness question is somewhat circular and fails to address the essential question in a reliance-based source of obligation, which is when reliance should be protected.[111] The question whether reliance in a given situation is reasonable is not, according to Barnett, an assessment we can make independently of the legal rule in the relevant community, because the question whether a reasonable person would rely is affected by their perception of whether or not the promise is enforceable. Enforceablity, therefore, depends on reasonableness, while reasonableness depends on enforceability. Barnett

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[109] Randy Barnett, 'A Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269, 274-6.

[110] Morris Cohen, 'The Basis of Contract' (1933) 46 *Harvard Law Review* 533, 579.

[111] Similar arguments have been made by PS Atiyah, 'Contracts, Promises, and the Law of Obligations' in *Essays on Contract* (1986) 10, 33 and Avery Katz, 'When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations' (1996) 105 *Yale Law Journal* 1249, 1254.

suggests that the consequence of that circularity is that a reliance theory of promissory liability ultimately does no more than re-state the crucial question, which is whether a promise should be enforced.

Barnett's discussion is not directly applicable in the Australian context, because here reliance-based obligations do not just result from reliance on promises, and reliance does not strictly result in the promise being 'enforceable'. Barnett does, however, show us that the reliance basis of equitable estoppel does not tell us when reliance by one party on an assumption induced by another should give rise to an obligation in equity to prevent detriment resulting from that reliance. It is equally clear that a reliance basis of common law estoppel does not tell us when reliance by one party on an assumption of fact induced by another should result in the second party being held to the assumed facts. By focussing on reliance, we can determine factual matters such as whether an assumption has been induced by the conduct of another party, we can establish the fact of reliance on that assumption, we can determine what detriment has resulted from reliance, and, in the case of the equitable doctrine, appropriate relief can be framed by reference to that detriment. But the only answer to the question: 'when should reliance be protected?' is 'when it is reasonable.'

It is clear that, as Barnett observes, the question of reasonableness assumes great importance in a reliance-based doctrine of estoppel: it determines when reliance should be protected, and requires a representee to act with circumspection when relying on the conduct of others. As Hugh Collins has put it, 'the real meat of the reliance model lies in the requirement that the reliance must have been reasonable.'[112] Barnett's claim that the reasonableness test is circular does not withstand scrutiny, however, because it is not true to say that reasonableness depends on enforceability. It would in fact be quite artificial to decide the question of reasonableness on the basis of enforceability, because most lay-people would not know when reliance on the conduct of another person is legally protected. Barnett seems to assume that a promisee's decision

[112] Hugh Collins, *The Law of Contract* (1st ed, 1986) 38.

as to whether to rely on a promise will be based solely on his or her perception of his or her legal rights. One could argue, however, that the fundamental consideration for most promisees is not whether their reliance will be protected by the courts, but whether the promisor can be expected to make good the promise. That argument is supported by Stewart Macaulay's finding that business people often do not act on the basis of legal sanctions which might be available to them in the event of a breakdown in their relationship with the party with whom they are dealing, but will prefer to rely on 'common honesty and decency'.[113] No doubt that tendency is even more prevalent outside the commercial arena.

Accordingly, the question of reasonableness cannot depend on enforceability.[114] Instead, as discussed at the beginning of this chapter, it is a policy question, which requires judges to set and apply standards of acceptable behaviour. As Atiyah suggests, the question of reasonableness is a community judgment, which draws on 'collective moral ideas and even customary practices and redistributive ideologies.'[115] Deciding when to protect reliance will inevitably involve a policy decision as to whether reliance should be protected in the circumstances in question.[116] That is so whether the policy question is in the guise: first, of a question whether the representee's reliance was reasonable; secondly, of a question whether the representor should reasonably have expected reliance; or thirdly, of a question whether it was unconscionable or

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[113] Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55, 58. See also Hugh Beale and Tony Dugdale, 'Contracts Between Businessmen: Planning and the Use of Contractual Remedies' (1975) 2 *British Journal of Law and Society* 45, 48-50.

[114] This statement contradicts the *dictum* of Mason CJ and Wilson J in *Waltons Stores* (1988) 164 CLR 387, 403 that voluntary promises are generally unenforceable because the promisee may reasonably be expected to appreciate that a promise will only be binding if it forms part of a binding contract. If a reasonable person could be taken to know that a promise is binding only if it forms part of a binding contract, and to rely only on biding promises, then it is difficult to see how an estoppel could ever arise from a promise. As Kenneth Sutton, 'A Denning Come to Judgment: Recent Judicial Adventures in the Law of Contract' (1989) 15 *University of Queensland Law Journal* 131, 138 has observed, the reasonable lay person might be surprised to hear that a promise is only binding if it forms part of a binding contract, since business people still regard a 'firm' offer as binding.

[115] PS Atiyah, 'Fuller and the Theory of Contract' in *Essays on Contract* (1986) 73, 87.

[116] Joseph Weinstein, above n 75, 809-10 has suggested that justifiable reliance is nothing less than a policy choice as to when the law should provide a remedy for reliance without a contract.

inequitable for the representor to depart from the assumption in question.[117] As Hugh Collins suggests, these vague standards simply 'alert us to the fact that the court is balancing competing policies when determining the province of legal enforceability.'[118]

A second deficiency in Barnett's critique of 'reasonableness' as a legal standard is his failure to make a compelling case for an alternative basis for liability. Barnett suggests that reliance should be protected only when it is reliance on 'a manifested intent to be legally bound.'[119] The problem with that formulation is that, as innumerable estoppel cases have shown us, people who make informal promises and representations tend not to indicate whether they intend to be legally bound. It is doubtful in most cases whether they even put their minds to the question. One must, therefore, choose between an inherently unreliable subjective approach, and an objective approach which destroys the rationale for looking at intention in the first place, which is to implement the will of the parties, rather than to impose obligations on them.[120]

VII. CONCLUSIONS

The choice between a 'reasonable expectation' approach and a 'reasonable reliance' approach goes to the heart of the doctrines of estoppel. Each involves the imposition of an objective limit on the potential application of a doctrine of estoppel. The former involves an objective determination from the perspective of the representor, which is consistent with a conscience-based doctrine, while the latter imposes an objective standard from the perspective of the representee,

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[117] As discussed at the beginning of this chapter, a reasonableness of reliance test is preferable because the policy question under such a test is more sophisticated, better defined and more clearly circumscribed. Under a reasonableness of reliance test, the court's attention is directed to the circumstances of the representee's reliance, and to the extent of that reliance, rather than to the broad question whether liability should be imposed in all of the circumstances.

[118] Above n 112, 38.

[119] Barnett, above n 109, 315.

[120] See Charles Fried, *Contract as Promise* (1981) 61; Clare Dalton, 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94 *Harvard Law Review* 997, 1039-1066; PS Atiyah, 'An Introduction to the Law of Contract' (5th ed, 1995) 150. These problems with the intention to create legal relations requirement as the primary basis for imposing promissory obligations are discussed in more detail Chapter 8 below.

which is consistent with a reliance-based doctrine. Although the reasonable expectation test may have a role to play in connection with the question of notice, it seems clear that the principal limit on the availability of a plea of estoppel in Australia is the reasonableness of reliance test, which focuses attention on the representee's reliance, rather than on the representor's conscience. That focus on the representee, rather than the representor, indicates that the primary concern of estoppel in Australia is to protect reliance, rather than to prevent unconscionable conduct.

Chapter 6

THE UNCONSCIONABILITY REQUIREMENT*

Up to this point, the establishment of an estoppel appears to be almost entirely concerned with the position of the representee, who must adopt the relevant assumption, must act in reliance on it so that he or she will suffer detriment if it is not adhered to, and must act reasonably in doing so. If that were all that were required to establish an estoppel, then one could conclude that both the common law and equitable doctrines had a very strong reliance focus. A number of judges have suggested, however, that, before the equitable doctrine can be invoked, 'something more' is required on the representor's side. That 'something more' is often referred to as the unconscionability requirement: an estoppel will arise only where it is unconscionable for the representor to resile from, or act inconsistently with, the relevant assumption.[1]

The prevailing wisdom in the Australian commentary is that 'unconscionability' is a key element required to establish an equitable estoppel.[2] The inclusion of this undefined element distinguishes equitable estoppel from its common law counterpart, the elements of which have always been clearly defined. That difference is clearly a significant barrier to the unification of the two sets of principles. This chapter will attempt to uncover what is involved in the

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* A version of this chapter has been published as 'Knowledge and Unconscionability in a Unified Estoppel' (1998) 24 *Monash University Law Review* 115-144.

[1] In *Forbes v Australian Yachting Federation Inc* (1996) 131 FLR 241, 287, for example, Santow J held that 'it is an essential element of the principle of [equitable] estoppel, that the conduct of the parties sought to be estopped must properly be characterised as "unconscionable"'.

[2] See, eg: Kenneth Sutton, 'Contract by Estoppel' (1989) 1 *Journal of Contract Law* 205, 212; Kenneth Sutton, 'A Denning Come to Judgment: Recent Judicial Adventures in the Law of Contract' (1989) 15 *University of Queensland Law Journal* 131, 143; Mark Dorney, 'The New Estoppel (1991) 7 *Australian Bar Review* 18, 24-5; Alec Leopold, 'Estoppel: A Practical Appraisal of Recent Developments' (1991) 7 *Australian Bar Review* 47, 60; JW Carter, 'Contract, Estoppel and Unconscionability' (1993) 1 *Judicial Review* 129, 131; Des Butler, 'Equitable Estoppel: Reflections and Directions' (1994) 6 *Corporate and Business Law Journal* 249, 250; JW Carter and DJ Harland, *Contract Law in Australia* (3rd ed, 1996) 133; GE Dal Pont and DRC Chalmers, *Equity and Trusts in Australia and New Zealand* (1996) 212-7; NC Seddon and MP Ellinghaus, *Cheshire and Fifoot's Law of Contract* (7th Aust ed, 1997) 64-5, 68-70.

unconscionability element, will attempt to reconcile the common law and equitable doctrines of estoppel in this regard and will address the philosophical implications of different approaches to the question of unconscionability.

Although a number of eminent jurists have suggested that unconscionability is a concept that cannot, and should not, be defined,[3] it is important to do so for three reasons.[4] First, if the doctrines of common law estoppel and equitable estoppel are to be unified, then this difference between them must be resolved. It is only by defining the concept of unconscionability that we can determine whether there is any real difference between the elements required to establish estoppels at common law and in equity. Secondly, leaving aside the question of unification, the concept should be defined for reasons of certainty. The open ended inquiry as to whether it is unconscionable to depart from an assumption adopted by another person is not a basis for a legal doctrine that is capable of yielding predictable results.[5] As Chief Justice Gleeson has observed, 'it has an alarming capacity to provoke disagreement as to its application to the facts of even fairly straightforward cases.'[6] Thirdly, and most importantly in the context of this thesis, it is important to attempt to understand how equitable estoppel operates in order to identify its conceptual foundations. Those conceptual foundations help

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[3] *Taylors Fashions v Liverpool Victoria Trustees Co Ltd* [1982] QB 133, 154 (Oliver J), 'the broad test of whether in the circumstances the conduct complained of is unconscionable [can be asserted] without the necessity of forcing those incumbrances into a procrustean bed constructed from some unalterable criteria'; *National Westminster Bank v Morgan* [1985] 2 WLR 588, 602 (Lord Scarman), 'Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends upon the particular facts of a case'; *Commonwealth v Verwayen* (1990) 170 CLR 394, 445 (Deane J): 'the question whether departure from the assumption would be unconscionable must be resolved not by some preconceived formula framed to serve as a universal yardstick but by reference to all of the circumstances of the case'; Sir Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238, 254: 'unconscionability ... is a concept not readily susceptible of precise definition'.

[4] There is also judicial support for a principled approach to unconscionability: *Collin v Holden* [1989] VR 510, 516 (Tadgell J), 'What is unconscionable must, however, be defined by reference to principle and not left to expediency'; *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582, 585 (Kirby P), 'offence to conscience being so much a matter of personal opinion, the notion has been tamed and classified according to established categories.'

[5] GH Treitel, *The Law of Contract* (9th ed, 1995) 136.

[6] AM Gleeson, 'Individualised Justice — The Holy Grail' (1995) 69 *Australian Law Journal* 421, 426.

us to appreciate the nature of the doctrine we are dealing with, and its relationship to other parts of the law of obligations.

Identifying the nature of the unconscionability requirement is not easy because, as Stephen Parker and Peter Drahos have observed, 'the justices are vague when it comes to suggesting what the "extra" requirements must be to make a breach [of promise] unconscionable.'[7] As this chapter will show, the central question that needs to be resolved is whether, in addition to the four core elements of assumption, inducement, detrimental reliance and reasonableness, a representor must be shown to have certain knowledge or a certain state of mind before the representor's departure from the relevant assumption will be regarded as unconscionable.[8] In other words, the key question is whether an element of knowledge or intention must be made out by a representee in order to establish an equitable estoppel.

The central argument to be made in this chapter is that the unconscionability requirement is fulfilled in most cases by the core elements discussed in the preceding chapters: assumption, inducement, detrimental reliance and reasonableness. It is only in cases where the representor has not actively induced the adoption of the relevant assumption that questions of knowledge or intention become relevant. In cases of estoppel by silence or acquiescence, the representor must know of the representee's adoption of the relevant assumption, and must have knowledge of the representee's detrimental reliance, or intend to induce such reliance. As this chapter will show, that approach in equity is mirrored in the common law estoppel cases, which have also required knowledge only in cases where the representor has remained passive.

On that basis, all that is required to reconcile common law and equitable estoppel in this regard is for the courts to make the elements of equitable estoppel explicit.

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[7] Peter Drahos and Stephen Parker 'Critical Contract Law in Australia' (1990) 3 *Journal of Contract Law* 30, 45.

[8] Dal Pont and Chalmers, above n 195, 214, suggest that 'the principal hallmarks of unconscionable conduct entail inducement, knowledge and intention on behalf of the representor'.

If the unconscionability element is defined, it will become clear that the elements required to establish an estoppel at common law and in equity are the same: assumption, inducement and reasonable detrimental reliance are required in cases where the representor has actively induced the relevant assumption, with the additional element of knowledge or intention required in cases where the representor has remained passive. The chapter will pursue that argument in three sections. The first part of the chapter will look at the common law estoppel cases to determine the extent to which the concept of unconscionability, and its essential ingredient of knowledge, are reflected in the common law doctrine. The second part looks at the nature and the role of the unconscionability element in equitable estoppel, and attempts to determine what is required to satisfy the requirement. The third part of the chapter suggests a way in which those approaches might be reconciled in a unified doctrine.

I. COMMON LAW ESTOPPEL

A. *English Origins*

If it is unconscionable conduct that motivates a court of equity to intervene in equitable estoppel cases, then it is 'inequitable' or 'unjust' conduct that underlies the common law doctrine. Common law estoppel is said to be based on the principle that it is 'most inequitable and unjust' for a person, having made a representation that is acted upon by another party, subsequently to deny the truth of that representation to the loss and injury of the person who acted on it.[9] Sir Anthony Mason has suggested that the concept of unjust departure underlying common law estoppel is in essence describing conduct regarded in equity as unconscionable.[10] Two important differences can, however, be discerned in the cases. First, unlike the concept of unconscionability, the notion of conduct which is inequitable or unjust is not at large in the common law cases, but is very clearly defined. Secondly, questions relating to the representor's knowledge or intention have played a far less prominent role in determining whether conduct is unjust or

[9] *Sarat Chunder Dey v Gopal Chunder Laha* (1892) 19 LR Ind App 203, 214-5 (PC).
[10] Mason, above n 3, 256.

inequitable at common law than they have in determining whether conduct is unconscionable in equity.

A number of the early cases at common law did stipulate that the representor must intend the representee to act on the representation in question before an estoppel will arise.[11] The requirement is given some prominence by Spencer Bower and Turner, who suggest that it has been taken for granted in those cases in which it was not mentioned.[12] The nature and strength of the requirement are, however, dramatically altered by the concession that the representor's intention need not be established directly and generally must be inferred from the use of language or conduct which was of such a nature as to induce a reasonable person to act as the representee did.[13] As discussed in Chapter 5, there is, in fact, considerable support for the proposition that proof of the representor's intention is not required; it is enough for the representee to prove that he or she acted reasonably in adopting and acting on the representation.[14] The most famous of such statements is Baron Parke's statement in *Freeman v Cooke*, which clarified the proposition of Lord Denman CJ in *Pickard v Sears*[15] that the representor must "wilfully" induce the representee's assumption. As noted in Chapter 5, Parke B said that it was sufficient if the representor conducts himself so that a reasonable man would take the representation to be true and believe he was meant to act upon it as true.[16]

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[11] *Pickard v Sears* (1837) 6 A & E 469; 112 ER 179; *De Bussche v Alt* (1878) 8 Ch D 286, 315; *Pierson v Altrincham Urban Council* (1917) 86 LJ KB 969; *Greenwood v Martins Bank Ltd* [1933] AC 51, 57.

[12] George Spencer Bower and Sir Alexander Turner, *The Law Relating to Estoppel by Representation* (3rd ed, 1977) 94.

[13] Ibid 95.

[14] Spencer Bower and Turner, ibid, citing *Freeman v Cooke* (1848) 2 Ex 654; 154 ER 652, 663; *Seton, Laing, & Co v Lafone* (1887) 19 QBD 68, 72 (CA); *Pierson v Altrincham Urban Council* (1917) 86 LJ KB 969, 972 (Lord Reading CJ), 973 (Lush J). Similarly Patrick Parkinson, 'Equitable Estoppel' in Patrick Parkinson (ed), *The Principles of Equity* (1996) 201, 259-60, citing also *De Bussche v Alt* (1878) 8 Ch D 286, 315 (Thesiger LJ for the Court of Appeal) and *Spiro v Lintern* [1973] 3 All ER 319, 328 (Buckley LJ for the Court of Appeal).

[15] (1837) 6 Ad & E 469, 474; 112 ER 179, 181.

[16] (1848) 2 Ex 654, 681; 154 ER 652, 663.

The Privy Council in *Sarat Chunder Dey v Gopal Chunder Laha*[17] later said that, in order to create estoppel, the law does not require that the representor 'must have been under no mistake himself or must have acted with intention to mislead or deceive.'[18] The Judicial Committee made it clear that the determining element is the representee's detrimental reliance, and that the court's attention is focussed on the representee: 'What the law and the Indian Statute [which adopted it] mainly regard is the position of the person who was induced to act.'[19] Thus, it is clear that, while judges in some of the early cases were concerned to limit the application of common law estoppel to those cases in which the representor intended the representation to be relied upon, the reasonableness of the representee's conduct quickly became an alternative basis for establishing an estoppel.

Despite the clarity of the judgments in *Freeman v Cooke* and *Sarat Chunder Dey v Gopal Chunder Laha*, we still find Lord Tomkins insisting in the House of Lords in 1933 that an 'intention to induce a course of conduct' was one of the 'essential factors giving rise to an estoppel'.[20] That is perhaps partly attributable to the fact that their Lordships were dealing with a case of estoppel by silence. Nevertheless, the Full Court of the South Australian Supreme Court in *Trenorden v Martin* suggested that, in applying this statement from Lord Tomkins' speech:

> it is necessary to remember that the intention can be implied, that is to say, "a man is taken to intend the natural and probable consequences of his acts, and cannot evade civil responsibility for these consequences by saying that he never intended any such result to ensue."[21]

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[17] (1892) 19 LR Ind App 203.
[18] Ibid 215. Their Lordships also approved, ibid 217, an earlier statement of Lord Esher MR that a fraudulent intention is not required, and observed that Lord Esher mentions 'other cases or classes of cases in which the determining element is not the motive with which the representation has been made, nor the state of knowledge of the party making it, but the effect of the representation as having caused another to act on the faith of it.'
[19] Ibid 215.
[20] *Greenwood v Martins Bank Ltd* [1933] AC 51, 57.
[21] [1934] SASR 340, 343, quoting M Cababé, *The Principles of Estoppel* (1888) 64.

Michael Cababé suggested in 1888 that the actual intention of the representor is irrelevant, and his or her conduct can establish an estoppel if a reasonable outsider looking at the conduct would take the representation to be true, and believe that it was meant that he should act upon it.[22] The reasonableness of the representee's reliance has, in the modern cases, become the primary basis for limiting the application of the doctrine.[23] The abandonment of questions of intention, even implied intention, is evident in *Avon County Council v Howlett*,[24] in which the Court of Appeal articulated the circumstances in which an estoppel by representation can be raised as a defence to a restitutionary claim. The court held that a plaintiff will be estopped from asserting a claim to restitution of moneys if three conditions are satisfied: first, the plaintiff must have made a representation of fact which led the defendant to treat the money as his or her own; secondly, the defendant must have, bona fide and without notice of the plaintiff's claim, changed his or her position; and, thirdly, the payment must not have been primarily caused by the fault of the defendant.[25] The court's focus was on the representee's detrimental reliance on the faith of the assumption induced by the representation, and no element of intention was required to be established or implied.

B. *Common Law Estoppel in the Australian Courts*

The trend in the English cases toward a focus on reasonable detrimental reliance and away from questions of intention was reflected in the early High Court decisions on common law estoppel, which were primarily concerned with the position of the representee. Those cases did not require proof of wilful conduct on the part of the representor or knowledge of the representee's detrimental reliance. The High Court emphasised the reliance basis of common law estoppel in statements of the purpose of the doctrine and in descriptions of its operation, both of which focussed on the position of the representee, to the exclusion of the representor. The leading statement of the purpose of the doctrine was that of

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[22] Cababé, ibid.
[23] See, eg, *Standard Chartered Bank Aust Ltd v Bank of China* (1991) 23 NSWLR 164.
[24] [1983] 1 All ER 1073.
[25] Ibid 1085 (Slade LJ, with whom Cumming-Bruce LJ and Eveleigh LJ agreed).

Dixon J in *Grundt v Great Boulder Pty Gold Mines Ltd* that 'the basal purpose of the doctrine ... is to avoid or prevent a detriment to the party asserting the estoppel'.[26] On the operation of the doctrine, Isaacs J in *Craine v Colonial Mutual Fire Insurance Co Ltd* distinguished common law estoppel from waiver by means of the fact that estoppel 'looks chiefly at the situation of the person relying on the estoppel' with the consequence that 'the knowledge of the person sought to be estopped is immaterial.'[27] The focus of the Australian courts on the position of the representee was reflected in the influential list of criteria laid down by Jordan CJ in *Franklin v Manufacturers Mutual Insurance Ltd*, which contained no reference to the representor's intention or knowledge.[28]

An important aspect of the principle of common law estoppel applied in the early Australian cases was that it did not include an undefined element equivalent to the notion of unconscionability in equitable estoppel. If an element of unconscionability, or its common law equivalent, unjust conduct, was required in the early cases, it was satisfied by the representor inducing the adoption of the relevant assumption by the representee,[29] as Dixon J made clear in *Thompson v Palmer*.[30] It is interesting to note that, in stark contrast with the statements in

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[26] (1937) 59 CLR 641, 674.

[27] (1920) 28 CLR 305, 327.

[28] (1935) 36 SR (NSW) 76, 82 (emphasis added):

> (1) by word or conduct (2) reasonably likely to be understood as a representation of fact, (3) a representation of fact, as contrasted with a mere expression of intention, should be made to another person, *either innocently or fraudulently*, (4) in such circumstances that a reasonable man would regard himself as invited to act upon it in a particular way, (5) and that the representation should have been material in inducing the person to whom it was made to act on it in that way (6) so that his position would be altered to his detriment if the fact were otherwise than as represented.

[29] It is important to note that the unjust or unconscionable conduct is the *departure* from the assumption. Departure from an assumption is only regarded as unjust or unconscionable, however, if the representor bears responsibility for its adoption.

[30] (1933) 49 CLR 507, 547:

> Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis of the assumption upon which the parties entered into contractual or other mutual relations ... or because he has exercised against the other rights which would exist only if the assumption were correct ... or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption; or because he directly made representations upon which the other party founded the assumption.

Dixon J reiterated the statement in *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR

relation to unconscionability mentioned above,[31] Dixon J was adamant in *Grundt v Great Boulder Pty Gold Mines Ltd* that the question of injustice or unfairness was not left at large.[32] It depended on the part played by the representor in the representee's adoption of the assumption, and the law 'defines with more or less completeness the kinds of participation in the making or acceptance of the assumption that will suffice'.[33] Given the influence which Justice Dixon's judgments[34] have had on the development of equitable estoppel in recent decisions of the High Court,[35] it is surprising that his obvious opposition to undefined notions of injustice has been ignored.[36]

While the representor's knowledge and intention have for some time been regarded as irrelevant to a common law estoppel arising from an express representation, those factors have played an important role in the case of an estoppel arising by silence. The High Court has reiterated on a number of occasions the principle articulated by Dixon J in *Thompson v Palmer* that an estoppel may arise where a party refrains from correcting another party '*knowing the mistake he laboured under*'.[37] While that principle turned on the representor's knowledge of the representee's mistake, the representor's knowledge of the action taken by the representee in reliance also came into

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641, 676. Similarly, in *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723, 734, Rich, Dixon and Evatt JJ observed that 'the injustice of allowing [the representor] to disregard the assumption must arise from the circumstances attending its adoption by the other party.' They went on to say, however, that material detriment resulting from reliance was also necessary to make it unjust to permit the departure from the assumption.

[31] Above n 3.

[32] Mason and Deane JJ noted in *Legione v Hateley* (1983) 152 CLR 406, 431 that 'the reference to an "unjust" departure was not seen by Dixon J as a charter for idiosyncratic concepts of justice and fairness.'

[33] (1933) 49 CLR 507, 676-7.

[34] In *Thompson v Palmer* (1933) 49 CLR 507 and *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641.

[35] See, eg, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 404 (Mason CJ and Wilson J), 419 & 427 (Brennan J), 458 (Gaudron J); *Commonwealth v Verwayen* (1990) 170 CLR 394, 429 (Brennan J), 453 (Dawson J), 501 (McHugh J).

[36] Seddon and Ellinghaus, above n 2, 68 have observed that some of the statements of Dixon J 'may be thought to preclude the use of a broad concept of unconscionability as a basis for determining whether the promisor may resile.'

[37] (1933) 49 CLR 507, 547 (emphasis added). See, to similar effect, *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 676 (Dixon J); *West v Commercial Bank of Australia Ltd* (1935) 55 CLR 315, 322 (Rich, Starke, Dixon and McTiernan JJ); *Laws Holdings Pty Ltd v Short* (1972) 46 ALJR 563, 570, (Gibbs J).

consideration in *Waltons Stores (Interstate) Ltd v Maher.*[38] Only two judges, namely Deane and Gaudron JJ, found an estoppel arising from an assumption of existing fact in that case, but they took quite different approaches to the question of knowledge.

Deane J applied the principle that a representor will be prevented from departing from an assumption of existing fact induced by silence 'where the party estopped has *knowingly* and silently stood by and watched the other party act to his detriment.'[39] That principle appears to require knowledge of the representee's detrimental action as well as knowledge of the representee's adoption of a mistaken assumption. Deane J found that Waltons knew the mistake which the Mahers laboured under, and its silence was deliberate and intended to produce the effect which it in fact produced.[40] It may be possible to infer from this that Deane J saw intention to induce reliance as an alternative to knowledge of reliance. Gaudron J, on the other hand, did not insist on knowledge in all cases of estoppel by silence. She found that no estoppel could arise by virtue of Waltons' 'failure to correct what it knew to be the mistaken belief' of the Mahers, because the evidence was not capable of supporting an inference that the appellant knew of the Mahers' mistaken belief.[41] Gaudron J did, however, find an estoppel arising by virtue of Waltons' imprudence, which was 'a proximate cause of [the Mahers'] adopting and acting on the faith of the assumption.'[42] The notion of estoppel by imprudence was drawn from the statement of Dixon J in *Thompson v Palmer*[43] which, Gaudron J said, required *no knowledge* as to the representor's state of mind.[44]

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[38] (1988) 164 CLR 387.
[39] Ibid 443 (emphasis added).
[40] Ibid 444.
[41] Ibid 461.
[42] Ibid 463.
[43] (1933) 49 CLR 507, 547.
[44] (1988) 164 CLR 387, 463.

In *Lorimer v State Bank of New South Wales*,[45] the New South Wales Court of Appeal took rather a different view of what was necessary to establish an estoppel by imprudence. The case involved an unsuccessful attempt by a farmer to establish an estoppel after he had acted to his detriment on the faith of an assumption that a bank had agreed to fund the expansion of his farm. All members of the Court of Appeal regarded the representor's knowledge as relevant to the question whether it had acted imprudently. In his dissenting judgment, Kirby P proceeded on the basis that estoppel by silence or negligence requires a finding that the representor knew of the representee's mistaken assumption and knew that the representee was acting to his or her detriment on the faith of that assumption.[46] Kirby P found that the representor's imprudence was a cause of the representee's adoption of the relevant assumption and detrimental action. He accepted that there was no finding that the representor had actual knowledge that the representee was acting on the faith of the assumption,[47] but appeared to regard a form of constructive knowledge as sufficient. His conclusion that the representor acted imprudently was based on the finding that the representor '*ought to have been aware* that there was a real possibility or likelihood' that the representee was acting to his detriment on the faith of the relevant assumption.[48] Prudence in those circumstances required the representor to disabuse the representee of the assumption.

Priestley JA also saw the question of the representor's imprudence as bound up with the question whether it knew or should have known of the representee's assumption. If the representor 'neither knew *nor had reason to know*' of the representee's assumption, according to Priestley JA, then the representor's conduct could not be said to be imprudent.[49] Handley JA held that estoppel by negligence or by silence depends upon findings that the representor knew that the representee was acting to his or her detriment on the faith of the relevant

[45] New South Wales Court of Appeal, Kirby P, Priestley JA and Handley JA, 5 July, 1991. Page numbers refer to the judgment transcript.
[46] Ibid 34.
[47] Ibid 34-7.
[48] Ibid 30 (emphasis added).
[49] Ibid 53 (emphasis added).The italicised words indicate that actual knowledge is not required.

assumption.[50] He therefore regarded both knowledge of the representee's mistake, and knowledge of the representee's reliance, as necessary to establish an estoppel in circumstances where the representor remained silent, whether the estoppel was characterised as an estoppel by silence or by imprudence. Handley JA also appeared to regard a form of constructive knowledge as sufficient: he found that a mistake cannot found an estoppel unless the representor was aware '*or should have been aware*' of the representee's mistake.[51]

While it seems clear that the representor's knowledge is relevant in cases of estoppel by silence at common law, the differences between the various approaches leave considerable doubt as to what the representor must know, and whether that knowledge is required in all such cases. One approach focuses on the representor's knowledge of the mistaken assumption adopted by the representee,[52] while another seems to require knowledge of both the mistaken assumption and the detrimental action taken by the representee.[53] A third view was articulated by Gaudron J in *Waltons Stores*: she appeared to regard the representor's knowledge as irrelevant in cases where the representee's adoption of the relevant assumption, and action on the faith of that assumption, can be attributed to the representor's imprudence. The judgments of the New South Wales Court of Appeal in *Lorimer v State Bank of New South Wales* indicate that actual knowledge on the part of the representor is not required in cases of estoppel by silence, provided it can be established that the representor ought to have known of the representee's adoption of, and reliance upon, the relevant assumption.

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[50] Ibid 69.
[51] Ibid 70 (emphasis added).
[52] *Thompson v Palmer* (1933) 49 CLR 507, 547 (Dixon J); *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 676 (Dixon J); *West v Commercial Bank of Australia Ltd* (1935) 55 CLR 315, 322 (Rich, Starke, Dixon and McTiernan JJ); *Laws Holdings Pty Ltd v Short* (1972) 46 ALJR 563, 570, (Gibbs J); *Lorimer v State Bank of New South Wales* (Priestley JA).
[53] *Waltons Stores* (1988) 164 CLR 387, 443-4 (Deane J); *Lorimer v State Bank of New South Wales* (Kirby P, who regarded constructive knowledge as sufficient).

In summary, it can be seen that the principles of common law estoppel are not readily susceptible to the introduction of an unconscionability element. The common law courts have always attempted to provide a clear definition of the circumstances in which an estoppel arises and the court's attention, in Australia at least, has been focussed almost exclusively on the representee. Although some of the early English cases were concerned with the representor's intention, that concern appears to have been transformed into a question of the reasonableness of the representee's reliance. It does seem clear, however, that the central ingredients of unconscionability, the representor's knowledge and intention, do have a role to play in cases where the representor has not made an express representation but has, by his or her silence, induced the adoption of, or reliance upon, an assumption of fact.

II. EQUITABLE ESTOPPEL

A. *Origins of the Unconscionability Question*

There are two different ways in which the question of unconscionability has been used to determine liability in equitable estoppel cases. In the recent Australian cases discussed below, unconscionability has been seen as one of the elements that must be made out by a representee in order to establish an equitable estoppel. The approach in some of the modern English cases, on the other hand, has been to adopt the question of unconscionability as the only inquiry that needs to be made in order to establish an estoppel: the courts have applied 'the broad test of whether in the circumstances the conduct complained of is unconscionable'.[54] In most of the early proprietary[55] and promissory[56] estoppel cases the representee was not required to show that the representor had behaved unconscionably in

[54] *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133, 154.
[55] *Gregory v Mighell* (1811) 18 Ves Jun 328; 34 ER 1211; *The Duke of Beaufort v Patrick* (1853) 17 Beav 59; 51 ER 954; *The Unity Joint Stock Mutual Banking Association v King* (1858) 25 Beav 72; 53 ER 563; *Dillwyn v Llewelyn* (1862) 4 De GF & J 517; 45 ER 1285.
[56] *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439; *Birmingham and District Land Co v London and North Western Railway Co* (1888) 40 Ch D 268, 286. In *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439, 448, Lord Cairns LC did use the expression 'inequitable' to describe the conduct of a party who sought to enforce rights which he or she had led another person to believe will not be enforced.

order to make out an estoppel. In *Dann v Spurier*, however, Eldon LC held that the onus was on the plaintiff to prove 'bad faith and bad conscience' against the defendant in order to make out an estoppel by encouragement.[57]

The broad unconscionability approach was developed in a series of proprietary estoppel cases in the 1970s, apparently as a reaction to the formulaic approach adopted in the influential case of *Willmott v Barber*, where Fry J laid down five elements that must be established in order to make out a plea of estoppel by acquiescence.[58] The unconscionability test appears to have its origins in the judgment of the Court of Appeal in *Shaw v Applegate* where, after doubting whether all of the five elements set out by Fry J must be satisfied in each case, Buckley LJ said:

> The real test, I think, must be whether upon the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it.[59]

The unconscionability question was also referred to by Scarman LJ in *Crabb v Arun District Council*,[60] but not as a definitive test. Scarman LJ held that, in order to invoke equitable estoppel, 'the plaintiff has to establish as a fact that the defendant, by setting up his right, is taking advantage of him in a way which is unconscionable, inequitable or unjust.'[61] The analysis of equitable estoppel on the basis of unconscionability reached its high point in the judgment of Oliver J in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd.*[62] Responding to

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[57] *Dann v Spurier* (1802) 7 Ves Jnr 232; 32 ER 94, 95-6.
[58] (1880) 15 Ch D 96, 105-6. Fry J held that where: (1) a plaintiff has made a mistake as to his or her legal rights, (2) the plaintiff has expended money or done an act on the faith of that mistaken belief, (3) the defendant knows of his or her own rights, (4) the defendant knows of the plaintiff's belief, and (5) the defendant has encouraged the expenditure, then the defendant is guilty of such fraud as will entitle the court to restrain the defendant from exercising his or her rights.
[59] [1977] 1 WLR 970, 977-8. Goff LJ agreed, ibid 980, 'that the test is whether, in the circumstances, it has become unconscionable for the plaintiff to rely on his legal right.'
[60] [1976] 1 Ch 179.
[61] Ibid 195.
[62] [1982] 1 QB 133.

counsel's attempt to separate equitable estoppel into rigidly defined categories with strict requirements, Oliver J held that the only inquiry he had to make was whether, in all the circumstances of the case, it was unconscionable for the representors to seek to take advantage of the mistake they shared with the representees.[63] As will be discussed below, the 'unconscionability' approach formulated by Oliver J was adopted with some modification by the High Court in *Waltons Stores (Interstate) Ltd v Maher.*[64]

B. *Origins of the Knowledge Requirement*

In both the early proprietary estoppel and promissory estoppel lines of cases are to be found inconsistent views on the questions of whether and when the court should be concerned with the representor's knowledge or intention. Turning first to proprietary estoppel, the requirement of knowledge has generally been imposed only in cases of estoppel by acquiescence, where the conduct complained of is standing by while the representee acts to his or her detriment on the faith of an assumed or anticipated interest in the representor's land. In most of the early cases the courts focussed on the question whether the representor knew of the mistaken belief adopted by the representee as to his or her rights, and appear to have assumed that the representor knew of the detrimental action taken by the representee.[65] The issue of knowledge assumes central importance in cases of estoppel by acquiescence. Where the representor has not engaged in any active conduct that induces the adoption of the relevant assumption, responsibility for any detriment suffered by the representee can only be attributed to the representor if the representor has stood by with knowledge that the representee was acting to

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[63] Ibid 155. For subsequent applications of the approach, see *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 1 WLR 1265, 1285-7 (Oliver LJ); *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] 1 QB 84, 104 (Robert Goff J at first instance); *British Leyland Motor Corporation v Armstrong Patents Co Ltd* [1982] FSR 481, 495 (Foster J); *Hoover PLC v George Hulme Ltd* [1982] FSR 565, 585-8 (Whitford J); *Wham-O MFG Co v Lincoln Industries Ltd* [1984] 1 NZLR 641, 671-6 (Davidson CJ for the New Zealand Court of Appeal); *Lim Teng Huan v Ang Swee Chuan* [1992] 1 WLR 113 at 117-8 (PC). See also Patrick Milne, 'Proprietary Estoppel in a Procrustean Bed' (1995) 58 *Modern Law Review* 412. Cf *Gillies v Keogh* [1989] 2 NZLR 327, 345-7 (Richardson J).

[64] (1988) 164 CLR 387.

[65] Although in *Dann v Spurier* (1802) 7 Ves Jnr 232; 32 ER 94, one of the reasons for the plaintiff's failure to establish an estoppel by acquiescence was that Eldon LC was not satisfied that the defendant knew of the repairs effected by the plaintiff to the property in question.

his or her detriment on the faith of that assumption.[66] In *Ramsden v Dyson* Lord Cranworth LC made it clear that in cases where one person builds on another's land, the latter's knowledge of the former's mistake is an essential ingredient in establishing liability.[67] Lord Kingsdown went further, suggesting that such knowledge was even required in cases where the representor had promised the representee an interest in the land in question or had created or encouraged an expectation on the part of the representee that he or she would have a certain interest.[68]

The element of knowledge was given the greatest prominence in Justice Fry's statement in *Willmott v Barber* of the five essential elements required to establish estoppel by acquiescence.[69] Justice Fry's five probanda included requirements that the representor must know of the existence of the representor's own rights and must know of the representee's mistaken belief as to his or her rights. There has been considerable discussion as to whether Fry J intended his five probanda to apply to all cases of proprietary estoppel, or just those in which the assumption adopted by the representee was induced by the representor's silence.[70] Although there was some ambiguity in the judgment, it appeared that Fry J was only setting out the elements of 'the *acquiescence* which will deprive a man of his legal rights'.[71] The elements of knowledge were required because, if the representor does not have such knowledge, 'there is nothing which calls on him to assert his own rights.'[72] Clearly, that explanation justifies the knowledge requirement only

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[66] In *Brand v Chris Building Co Pty Ltd* [1957] VR 625, the defendant failed to make out a case of estoppel by acquiescence because the plaintiff was aware of neither the defendant's mistake nor the defendant's acts of reliance. Hudson J held, ibid 629, that no estoppel arose because there was nothing 'in the nature of a fraud' to raise an equity against the plaintiff. Similarly, in *KMA Corporation Pty Ltd v G & F Productions Pty Ltd* (1997) 38 IPR 243, Eames J held that an estoppel by silence could not arise without, *inter alia*, knowledge of the mistaken assumption made by the representor.

[67] (1866) LR 1 HL 129, 140-1.

[68] Ibid 170-1, cited with approval by the Privy Council in *Plimmer v Wellington Corporation* (1884) 9 HLC 699, 710.

[69] (1880) 15 Ch D 96, 105-6.

[70] See, eg, *Shaw v Applegate* [1977] 1 WLR 970, 977-8; *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] 1 QB 84, 104; *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133 at 155-6; MP Thompson, 'From Representation to Expectation: Estoppel as a Cause of Action' [1983] *Cambridge Law Journal* 257, 267-272; Milne, above n 63, 416.

[71] (1880) 15 Ch D 96, 105 (emphasis added).

[72] Ibid.

in cases where the representor remains silent; the requirement should not, therefore, apply in cases where the representor has actively led the representee to believe that his or her legal rights will not be asserted. As Evershed MR said in *Hopgood v Brown*, Justice Fry's formulation 'was addressed to and limited to cases where the party is alleged to be estopped by acquiescence, and it is not intended to be a comprehensive formulation of the necessary requisites of any case of estoppel by representation.'[73] Despite the statement of Lord Kingsdown in *Ramsden v Dyson* mentioned above, the better view is that the requirement of knowledge applies only in cases of mere acquiescence.[74]

In the promissory estoppel cases, the contentious question has not been whether the representor must have had knowledge of the representee's reliance, but whether the representor must have intended reliance or must have intended his or her promise to be binding. No such element of intention is to be found in Lord Cairns' statement of principle in *Hughes v Metropolitan Railway Co*,[75] or that of Bowen LJ in *Birmingham and District Land Co v London and North Western Railway Co*.[76] The principle extracted from those two cases by Denning J in *Central London Property Trust Ltd v High Trees House Ltd*,[77] however, required that a promise be 'intended to be binding, intended to be acted upon and in fact acted upon' before it would be binding in equity.[78] That intention on the part of the representor was not an element of the principle of promissory estoppel adopted by the Privy Council in *Ajayi v RT Briscoe (Nigeria) Ltd*,[79] which was held to apply where a party to a contract agrees not to enforce his or her rights and the other party to the contract alters his or her position on the faith of that

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[73] [1955] 1 WLR 213, 223.
[74] *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1970] 2 All ER 871, 895 (Lord Diplock); *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133, 155-6; Thompson, above n 70, 267-70; PV Baker and PStJ Langan, *Snell's Equity* (29th ed, 1990) 576. It also appeared to be implicit in the statement of Lord Bridge in *Lloyds Bank v Rossett* [1991] 1 AC 107, 132 that, once an agreement to share a property beneficially is found, it is only necessary for the party asserting a beneficial interest to show that he or she has acted to his or her detriment in reliance on the agreement in order to give rise to a proprietary estoppel.
[75] (1877) 2 App Cas 439, 448.
[76] (1888) 40 Ch D 268, 286.
[77] [1947] 1 KB 130.
[78] Ibid 136.
[79] [1964] 3 All ER 556.

promise.[80] Nevertheless, Denning J continued to assert the requirement of intention in subsequent promissory estoppel cases,[81] and it was taken up by Lord Diplock in the House of Lords in *Kammins Ballroom Co Ltd v Zenith Investments (Torquay) Ltd.*[82] In New Zealand, it has also been held that the representor must both intend to affect the relations between the parties and intend to induce reliance.[83]

A significant difference between the promissory estoppel cases and the proprietary estoppel cases, therefore, is that, while the proprietary estoppel cases have been concerned with the representor's *knowledge* of the representee's assumption or acts of reliance, the promissory estoppel cases have tended to focus on the representor's *intention* to affect the legal relations between the parties or to induce reliance by the promisee.[84] In *The "Kanchenjunga"* the House of Lords went so far as to say that, in establishing a promissory estoppel, 'no question arises of any particular knowledge on the part of the representor'.[85] There has, however, been at least one promissory estoppel case which was concerned with the representor's knowledge. In *James v Heim Gallery (London) Ltd* the Court of Appeal held that, in order to found a promissory estoppel, a promise 'must have been made in circumstances in which, to the promisor's knowledge, the promise would be acted upon by the promisee'.[86] In bringing together the principles of promissory estoppel with those of proprietary estoppel,

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[80] Ibid 559.

[81] *Foot Clinics (1943) Ltd v Cooper's Gowns Ltd* [1947] 1 KB 506, 510-11; *Robertson v Minister of Pensions* [1949] 1 KB 227, 230; *Charles Rickards Ltd v Oppenhaim* [1950] 1 KB 616, 623 (CA); *Combe v Combe* [1951] 2 KB 215, 220 (CA); *Plasticmoda Societa Per Azione v Davidsons (Manchester) Ltd* [1952] 1 Lloyd's Rep 527, 539 (CA); *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, 213 (CA); *Brikom Investments Ltd v Carr* [1979] 2 All ER 753, 758 (CA). Cf *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* [1974] 3 All ER 575, 580 (CA).

[82] [1970] 2 All ER 371, 895. See also *Braithwaite v Winwood* [1960] 1 WLR 1257, 1262, where Cross J rejected a plea of promissory estoppel on the basis that there was no evidence that what was said by the representor 'was intended to effect (sic) the legal relations between the parties'.

[83] In *Burbery Mortgage Finance & Savings Ltd v Hindsbank Holdings Ltd* [1989] 1 NZLR 356, 361, Richardson J held that the promise or assurance must be 'intended to affect the relations between [the parties] and to be acted upon accordingly.'

[84] In *Cameron v Murdoch* [1983] WAR 321, 360, Brinsden J held that the intention to affect legal relations requirement did not apply in proprietary estoppel cases, and doubted whether it was even satisfied in all of the promissory estoppel cases.

[85] *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The "Kanchenjunga")* [1990] 1 Lloyd's Rep 391, 399.

the Court of Appeal in *Crabb v Arun District Council* appeared to retain the element of knowledge from the proprietary estoppel cases, at least in the case of estoppel by silence.[87] The case involved a difficult question as to whether the representor induced the representee's adoption of the relevant assumption by direct conduct or by silence.[88] That question ultimately did not need to be resolved because the Court of Appeal held unanimously that the representor knew of the representee's intention to act on the faith of the relevant assumption.[89] In an interesting combination of the approaches in the proprietary and promissory estoppel cases, Lord Denning MR held that in all cases of equitable estoppel the representor must, at the time of inducing the relevant assumption, *know or intend* that the representee will act on the faith of the belief.[90] Rejecting the trial judge's stipulation that the representor must have known of the action taken by the representee on the faith of the assumption, Lord Denning held that it was sufficient that the representor knew of the representee's intention to rely, and engaged in positive conduct which confirmed the relevant assumption.[91] Similarly, Scarman LJ held that an equity arose against the defendant because of the positive actions by which it induced the adoption of the relevant assumption, and because it knew of the plaintiff's intended detrimental reliance.[92]

Unfortunately, the adoption of a broad unconscionability approach to determining liability appears to have reopened the possibility that inquiries as to the representor's knowledge may not be confined to cases of estoppel by silence. In *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd*, Oliver J held that, in

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[86] (1950) 256 EG 819, 823 (Buckley LJ, with whom Shaw and Oliver LJJ agreed).
[87] [1976] 1 Ch 179. Lord Denning MR, ibid 187-8, and Scarman LJ, ibid 193, recognised that the principles of estoppel recognised in courts of equity could be seen as emanations of the same broad principle, which prevent a person from insisting upon his or her legal rights where it is inequitable to do so in the light of the dealings which have taken place between the parties.
[88] Ibid 197 (Scarman LJ).
[89] Ibid 189 (Lord Denning MR), 192 (Lawton LJ), 198 (Scarman LJ).
[90] Ibid 188. The statement of Lord Denning MR was cited by Brennan J in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 423, who went on to say that the knowledge or intention that the assumption or expectation will be acted upon may be easily inferred in the case of a promise, but may be more difficult to draw in the case of encouragement or acquiescence.
[91] [1976] 1 Ch 179, 189. The relevant assumption adopted by the representee was that he would have a right of access over the representor's land. That assumption was confirmed by the representor putting up gates at the point of access.
[92] Ibid 196.

deciding whether the representor's conduct is unconscionable, knowledge is only one of the relevant factors to be taken into account in the overall inquiry.[93] Oliver J did, however, appear to recognise that knowledge of the representee's mistake would be necessary in cases involving 'acquiescence pure and simple', where all the representor has done is to stand by without protest.[94]

In summary, there is considerable inconsistency in the English cases as to whether knowledge of the representee's reliance, or an intention to induce reliance, on the part of the representor is required to establish an equitable estoppel. The better view, which is supported by a coherent rationale, is that knowledge of the representee's reliance or an intention to induce reliance should only be required in cases of mere acquiescence. As Oliver J explained in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd*, 'in a case of mere passivity, it is readily intelligible that there must be shown a duty to speak, protest or interfere which cannot normally arise in the absence of knowledge or at least a suspicion of the true position.'[95] Where the representor, by a promise, a representation or other unequivocal conduct, induces the representee to adopt an assumption, then the representor bears responsibility for the representee's loss by reason of that conduct alone.

C. *The Approach of the High Court*

1. *Legione v Hateley*

Although the concept of unconscionability had begun to dominate the decisions of the English courts by the time the High Court came to hear *Legione v Hateley*,[96] the concept was not part of the doctrine of promissory estoppel accepted by the Court. The only members of the Court to uphold the plea of equitable estoppel, Gibbs CJ and Murphy J, did not invoke the requirement of

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[93] [1982] 1 QB 133, 152.
[94] Ibid at 155-6. See *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] 1 QB 84, 104 (Robert Goff J at first instance).
[95] [1982] 1 QB 133, 147.
[96] (1983) 152 CLR 406.

unconscionability, but did require conduct which was *inequitable* before an estoppel would arise.[97] They held that an estoppel would arise if it was inequitable for the representors to depart from the induced assumption without first notifying the representees of their intentions.[98] No question of knowledge of the representees' reliance appeared to arise. The representors' conduct was held to be inequitable on the basis that the representors had induced the belief that their legal rights would not be enforced and the representees had altered their position to their detriment on the faith of that belief.[99] The requirement of inequitable conduct was, therefore, satisfied by the core elements of assumption, inducement and detrimental reliance.

2. Waltons Stores (Interstate) Ltd v Maher

The concept of unconscionability reached its high point in Australia in the decision of the High Court in *Waltons Stores (Interstate) Ltd v Maher* which, it is important to recall, was a case of an estoppel arising by silence.[100] Mason CJ and Wilson J suggested that courts of equity intervene in equitable estoppel cases to prevent unconscionable conduct. A mere failure to fulfil a promise does not amount to unconscionable conduct and, accordingly, detrimental reliance on an executory promise does not bring promissory estoppel into play. 'Something more would be required.'[101] They suggested two different ways in which that 'something more' could be established. First, it may be found in the creation of an assumption that a contract will come into existence or a promise will be performed, and detrimental reliance on that assumption *to the knowledge of the other party.*[102] Secondly, it may be found in the representor's reasonable expectation of detrimental reliance by the representee.[103] On the facts, Mason CJ

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[97] The notion that conduct must be inequitable before it could give rise to a promissory estoppel was supported by *D & C Builders Ltd v Rees* [1965] 2 QB 617, 625, where Lord Denning held that a promissory estoppel would only prevent the creditor from asserting his legal rights 'where it would be inequitable for him to insist upon them.'

[98] (1983) 152 CLR 406, 421.

[99] Ibid 422-3.

[100] (1988) 164 CLR 387 ('*Waltons Stores*').

[101] Ibid 406.

[102] Ibid, drawing on *Attorney-General (Hong Kong) v Humphrey's Estate Ltd* [1987] 1 AC 114 (PC).

[103] Ibid, drawing on the doctrine of promissory estoppel applied in the United States, as

and Wilson J found the necessary element in the representor's knowledge that the representees were acting to their detriment on the basis of a false assumption, and the representor's inaction in those circumstances.[104] If one looks at unconscionability as an element that must be established in addition to the core elements of equitable estoppel discussed in the preceding chapters, then the essence of the unconscionability requirement, on the interpretation of Mason CJ and Wilson J, is knowledge or a reasonable expectation of the representee's detrimental action or inaction.

Brennan J conveniently reduced his understanding of what is required to establish an equitable estoppel to a list of six elements that a plaintiff must prove.[105] Element one requires the adoption of an assumption by the representee, element two requires the representor's inducement of that assumption, elements three and five require the representee's detrimental reliance on that assumption and element six requires that the representor has failed to act to avoid the detriment. The equivalent of the 'something extra' required by Mason CJ and Wilson J is to be found in element four: that the representor must have known of or intended the representee's detrimental action or inaction in reliance on the relevant assumption.[106]

Mark Dorney has suggested that there is a significant difference between the approaches of Mason CJ and Wilson J and Brennan J to this issue.[107] Dorney suggests that while Brennan J would treat knowledge 'as a necessary precondition to the exercise of the jurisdiction ... Mason CJ and Wilson J would view knowledge simply as one factor to be weighed in balancing the equities involved in the particular case'.[108] In other words, while Brennan J saw knowledge as one of the factors that a plaintiff must establish in each case, Mason CJ and Wilson J saw it as one of the factors which can make it unconscionable for the representor to resile from his or her representation.

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described in s 90 of the Restatement of Contracts (2d).
[104] (1988) 164 CLR 387, 407-8.
[105] Ibid 428-9.
[106] Cf Butler, above n 2, 250.
[107] Dorney, above n 2, 27.

Ultimately, however, if one leaves to one side the fundamental and indisputable requirements of assumption, inducement and detrimental reliance, it is difficult to see what the unconscionability element can be, other than knowledge or imputed knowledge.[109] That seemed to be the approach adopted by Kenneth Sutton, when he suggested that the element of unconscionability can be met by establishing knowledge by the representor of the representee's reliance or a reasonable expectation of reliance.[110] The 'something extra' required by Mason CJ and Wilson J is equivalent to, and differed only slightly from, Justice Brennan's fourth element. What is required is knowledge of the representee's detrimental reliance; while Brennan J appeared to require actual knowledge, Mason CJ and Wilson J would impute knowledge where it was reasonable to expect reliance. The question whether constructive or imputed knowledge will suffice is an important one: as Peter Drahos and Stephen Parker have suggested, once constructive knowledge is accepted, it becomes difficult to deny that the courts are simply protecting reasonable reliance.

> Once the door to constructive knowledge is opened, one slides towards the position that a promisor is deemed to know of detriment when it was reasonably incurred by the promisee. So one just enforces reasonable reliance and outflanks consideration.[111]

The notion that reasonable reliance alone should be protected is not too far from the position taken by Mason CJ and Wilson J in *Waltons Stores*, when they said that the reason mere reliance on a promise to do something did not bring promissory estoppel into play was because a promisee should reasonably be expected to know that to be binding it must form part of a binding contract.[112] When the circumstances are such that the representee's reliance on the relevant assumption is reasonable, then it could be argued that the representor's departure

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[108] Ibid.
[109] See Drahos and Parker, above n 7, 46.
[110] Sutton, above n 2.
[111] Drahos and Parker, above n 7, 46.
[112] (1988) 164 CLR 387, 417, citing *Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd* [1982] 1 QB 84, 107.

from that assumption should be regarded as unconscionable and, therefore, actionable.

The High Court's approach to equitable estoppel in *Waltons Stores* was clearly shaped by the fact that the estoppel arose in that case by way of silence. The court's profound concern with questions of knowledge and unconscionability is justified by the fact that the representor in that case had not actively induced the adoption of the relevant assumption. The imposition of a knowledge requirement in those circumstances is consistent with the cases at common law and in equity in which knowledge has been held to be an essential element of estoppel by silence.[113] As Spencer Bower and Turner have said:

> The necessity for actual knowledge on the part of the representor is a characteristic of all estoppels by silence, and in this respect such estoppels differ from estoppels based on representations by words or positive conduct, in which the effect on the representee, not the state of mind of the representor, is the aspect of the matter with which the court is principally concerned.[114]

A final aspect of the *Waltons Stores* decision which is of considerable importance to the unconscionability question was Justice Brennan's inclusion of an 'intention to affect legal relations' requirement in equitable estoppel. Brennan J held in *Waltons Stores* that the doctrine of equitable estoppel 'has no application to an assumption or expectation induced by a promise which is not intended by the promisor and understood by the promisee to affect their legal relations.'[115] The requirement was imposed, as Brennan J explained, to solve the problem of

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[113] In addition to the cases discussed elsewhere in this chapter, it is also consistent with the New Zealand Court of Appeal's refusal to find a representor's 'lack of action' unconscionable in circumstances where the representee's reliance had not been brought to its attention: *Gold Star Insurance Co Ltd v Gaunt* (1992) 7 ANZ Ins Cas 61-097, 77,397.

[114] Spencer Bower and Turner, above n 12, 288.

[115] (1988) 164 CLR 387, 421, adopting a statement of Denning LJ in *Combe v Combe* [1951] 2 KB 215, 220. In *Gollin & Co Ltd v Consolidated Fertiliser Sales Pty Ltd* [1982] Qd R 435, 453 WB Campbell J also appeared to accept that an intention on the part of the promisor to affect the legal relations between the parties was required to establish a promissory estoppel. As noted above, the requirement was also articulated in *Burbery Mortgage Finance & Savings Ltd v Hindsbank Holdings Ltd* [1989] 1 NZLR 356, 361 (Richardson J).

estoppel being used in a pre-contractual context where parties expected to be able to agree to terms.[116] Where two parties expect to reach an agreement, but each recognises that the other is free to withdraw from the negotiations before a binding agreement is concluded, then 'it cannot be unconscionable for one of the parties to do so.'[117] There are, however, other ways in which the requirements of estoppel already deal with that problem. First, the nature of the assumption should be scrutinised carefully, as Deane J did in *Waltons Stores*.[118] A representation as to a party's present intention cannot found an estoppel, unless that party also indicates that they do not intend to change their mind in the future, because it is clear that a change of mind is possible.[119] Even if the representee does assume that the representor will not change his or her mind, the representee must act reasonably in adopting and acting upon that assumption.[120] It would rarely be reasonable for a party involved in contractual negotiations to assume that terms will be agreed and a contract concluded, and even more rarely be reasonable to act on such an assumption.[121]

Justice Brennan's requirement that a representor must intend to affect the parties' legal relations did not receive support from any of the other judges in *Waltons Stores* and, perhaps more importantly, was not referred to by any members of the High Court in *Commonwealth v Verwayen*.[122] The facts of *Verwayen* show that the contractual 'intention to affect legal relations' requirement is inappropriate outside the contractual context. In *Verwayen*, there was no suggestion that the Commonwealth intended to be bound by its statement that it would not plead the

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[116] (1988) 164 CLR 387, 422-3.
[117] Ibid 423.
[118] Ibid 450.
[119] Reliance on such a representation was found not to give rise to an estoppel in *Maunsell v Hedges* (1854) 4 HLC 1039; 10 ER 769. As noted in Chapter 5, Francis Dawson, 'Making Representations Good' (1982) 1 *Canterbury Law Review* 329, 335, has suggested that the representation in *Maunsell v Hedges* was 'couched in such terms that the representee could not be said to have reasonably placed reliance upon it.'
[120] See Chapter 5 above.
[121] KE Lindgren and KG Nicholson, 'Promissory Estoppel in Australia' (1984) 58 *Australian Law Journal* 249, 258-9 have advocated an objective approach to the question of intention, by analogy with the objective approach to contract formation. They argued that an objective question of intention to affect legal relations covers the same ground as an objective inquiry as to the representor's intention to induce reliance.
[122] (1990) 170 CLR 394 ('*Verwayen*'). It is also impossible to reconcile the existence of such a requirement in Australian law with the decision of Hodgson J in *W v G* (1996) 20 Fam LR 49,

limitation defence or the defence of no duty of care. The assumption adopted by Mr Verwayen was not that the Commonwealth was *bound* not to plead the relevant defences, but simply that it had made a decision not to do so, and that the decision would not be changed.[123] Such an assumption was reasonable in the unusual circumstances of the case.[124]

The principle that a promisor must intend to be legally bound before an estoppel can arise originated from the judgments of Lord Denning relating to promissory estoppel. It is clear from Lord Denning's extra-judicial writings that he thought the intention to affect legal relations requirement should be imposed only in those cases involving deliberate promises.[125] The requirement of an intention to affect legal relations stood as an alternative to detrimental reliance in such cases, which, he said, 'seem to fall more naturally under the law of contract, rather than the law of estoppel.'[126] The source of obligation in such cases was the promise itself, rather than the representee's detrimental reliance. The requirement that a promisor must intend to affect the legal relations between the parties flows naturally from such a view of promissory estoppel.

This raises the philosophical question, which will be addressed in Chapter 8 of this thesis, whether the broader, substantive doctrine of equitable estoppel applied by the Australian courts is based on promise, as the principle of promissory estoppel applied by Lord Denning clearly was. The argument will be advanced in Chapter 8 that the doctrine of equitable estoppel applied in Australia is not contractual, and is not based on the notion of the assumption of obligation through promise. If that is so, then it should be irrelevant to the establishment of such an estoppel whether the representor intended to be bound by his or her promise or intended, by his or her actions, to affect the legal relations between the parties. It is not necessary to impose a requirement that the representor must intend to be bound by his or her promise because there are other factors, notably

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discussed in Chapter 1 above.
[123] (1990) 170 CLR 394, 414 (Mason CJ).
[124] Ibid.
[125] AT Denning, 'Recent Developments in the Doctrine of Consideration' (1952) 15 *Modern Law Review* 1, 9.

the reasonableness requirement, which serve to limit the availability of equitable estoppel.

3. *Commonwealth v Verwayen*

A feature of Chief Justice Mason's judgment in *Commonwealth v Verwayen*, which has attracted considerable comment, is that the Chief Justice joined Deane J in accepting a unification of common law and equitable estoppel. More interesting for present purposes, however, is the fact that, in applying the principles of that unified doctrine to the facts, Mason CJ seems to have abandoned both the 'unconscionability' element and the requirement of knowledge which were so prominent in his joint judgment with Wilson J in *Waltons Stores*. In applying the principles of the unified doctrine to the facts in *Verwayen*, the Chief Justice considered only the need to establish that the Commonwealth induced the adoption of the relevant assumption by Mr Verwayen,[127] the element of detriment[128] and the nature of the relief appropriate to satisfy the estoppel.[129] Neither the element of unconscionability, nor the need for the representor to have knowledge or a reasonable expectation of the representee's reliance were mentioned in Chief Justice Mason's application of the doctrine to the facts. The abandonment of those concepts is evident in the Chief Justice's description of the operation of the single doctrine of estoppel in terms which focused on the elements of assumption, inducement and detrimental reliance, and which did not include elements of unconscionability or knowledge.[130]

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[126] Ibid.
[127] (1990) 170 CLR 394, 414.
[128] Ibid 415-6.
[129] Ibid 416-7.
[130] Ibid 413:

> [I]t should be accepted that there is but one doctrine of estoppel, which provides that a court of common law or equity may do what is required, but not more, to prevent a person who has relied upon an assumption as to a present, past or future state of affairs (including a legal state of affairs), which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness. A central element of that doctrine is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid.

Two important conclusions can be drawn from Chief Justice Mason's apparent abandonment of the concept of unconscionability and the requirement of knowledge in *Verwayen*. First, both developments can be seen as a means of reconciling equitable estoppel with the common law doctrine. In other respects, Chief Justice Mason's version of a unified estoppel can be seen as an extension of equitable estoppel to cover representations of existing fact. The extent to which Chief Justice Mason's unified doctrine draws on equitable estoppel is particularly apparent in his approach to relief, which allows the court a discretion to fashion relief which is proportional to the detriment suffered.[131] Common law estoppel, in contrast, operates simply by holding the representor to the truth of the assumption which his or her conduct has induced,[132] allowing the court no flexibility in the granting of relief.[133] In abandoning the unconscionability element, and with it the requirement that the representor must have knowledge of the representee's detrimental reliance, however, Mason CJ can be seen to be rationalising the unified estoppel with the strongly reliance-based approach of the common law doctrine. The emphasis on reliance was particularly marked in the early Australian High Court decisions on common law estoppel.[134] As discussed above, the approach adopted in those cases focussed attention on the position of the representee, and did not involve any inquiry into the knowledge of the representor. The second conclusion that can be drawn from Chief Justice Mason's abandonment of the knowledge requirement is that it is consistent with the notion that knowledge is not required, at common law or in equity, where the representor has induced the relevant assumption by means of positive conduct. The relevant assumption in *Verwayen* was, unlike that in *Waltons Stores*, induced by a clear representation on the part of the Commonwealth. The fact that Mason CJ imposed a knowledge requirement in *Waltons Stores*, but did not do so in *Verwayen*, is explicable on the basis that that knowledge is only required to establish estoppels by silence.

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[131] Ibid.

[132] *Thompson v Palmer* (1933) 49 CLR 507, 547; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674.

[133] *Waltons Stores* (1988) 164 CLR 387, 414 (Brennan J). This question is addressed in detail in Chapter 7 below.

[134] *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305; *Thompson v Palmer* (1933) 49 CLR 507; *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723;

Chief Justice Mason's omission of the element of knowledge in *Verwayen* is particularly interesting when one looks at his later, extra-judicial attempt to rationalise the unification of equitable and common law estoppel on the basis that conduct which is regarded as 'unconscionable' in equitable estoppel is equivalent to the 'unjust' conduct which was at the basis of common law estoppel in cases such as *Thompson v Palmer*[135]and *Grundt v Great Boulder Pty Gold Mines Ltd.*[136] The approach taken in *Verwayen* moves the concept of unconscionable conduct closer to that of unjust conduct: it was more clearly defined, more focussed on the representee's reliance, and did not involve the element of knowledge of the representee's detrimental reliance.

While Brennan J did not discuss the elements of knowledge or unconscionability in *Verwayen*, those elements were discussed by Deane J at some length.[137] The unified doctrine of estoppel applied by Deane J was based on the notion that the law will not permit an unconscionable departure from an assumption which has been adopted and acted upon by another party.[138] Although Deane J said that the question whether departure would be unconscionable could not be resolved by some preconceived formula serving as a universal yardstick, it appeared that he regarded the question as having two elements: first, the part played by the representor in the adoption of or persistence of the assumption and, secondly, some additional element rendering the representor's conduct unconscionable in the circumstances.[139]

The representor would bear sufficient responsibility for the representee's assumption to establish the first element where the representor:

> (a) has induced the assumption by express or implied representation; (b) has entered into contractual or other material relations with the other party

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Grundt v Great Boulder Pty Gold Mines Ltd (1937) 59 CLR 641.
[135] (1933) 49 CLR 507.
[136] (1937) 59 CLR 641.
[137] (1990) 170 CLR 394, 440-1 & 444-5.
[138] Ibid 444.

> on the conventional basis of the assumption; (c) has exercised against the other party rights which would exist only if the assumption were correct; (d) knew that the other party laboured under the assumption and refrained from correcting him when it was his duty in conscience to do so.[140]

It is more difficult to categorise the circumstances in which Deane J envisaged the second element being made out. It may depend on:

(a) the reasonableness of the conduct of the representee in acting upon the assumption;
(b) the nature and extent of the detriment the representee would suffer if departure from the assumption were permitted; or
(c) where the assumption has been induced by an express or implied representation, 'whether the allegedly estopped party knew or intended or clearly ought to have known that the other party would be induced by his conduct to adopt, and act on the basis of, the assumption.'[141]

Like the unconscionability element required by Mason CJ and Wilson J in *Waltons Stores*, Justice Deane's unconscionability element can ultimately be reduced to the question of knowledge. If we leave aside the core elements of assumption, inducement and reasonable detrimental reliance, the only element remaining is the question of the representor's knowledge or imputed knowledge of the potentially detrimental action being taken by the representee. Of particular significance is Justice Deane's suggestion that actual knowledge may not be required. His description of the second element leaves open the possibility that either the reasonableness of the representee's conduct, or the nature and extent of the detriment, alone may satisfy the unconscionability requirement, without any inquiry as to knowledge on the part of the representor. Imputed knowledge may also suffice, perhaps even in cases of estoppel by silence. Even more than the approach to unconscionability articulated by Mason CJ and Wilson J in *Waltons*

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[139] Ibid 444-5.
[140] Ibid 444.
[141] Ibid 445.

Stores, Justice Deane's definition admits of the possibility that the court may simply protect reasonable reliance.

Dawson J did not discuss the unconscionability requirement in any detail, but did advert briefly to the question whether the Commonwealth's departure from the relevant assumption was unconscionable in the circumstances. His conclusion that the Commonwealth's departure was unconscionable appeared to be based exclusively on the part played by the Commonwealth in inducing Verwayen's adoption of the relevant assumption.[142] The only other member of the Court to discuss the doctrine of equitable estoppel in any detail was McHugh J, who conveniently spelt out the circumstances in which it will be unconscionable for a party to insist on his or her strict legal rights.[143] Three elements are required: inducement, detrimental reliance and knowledge on the part of the representor of the representee's detrimental action or inaction.

Justice McHugh's approach follows that of Mason CJ and Wilson and Brennan JJ in *Waltons Stores* in requiring knowledge, in addition to the core elements of equitable estoppel, in order to satisfy the unconscionability element. Interestingly, however, McHugh J was the only member of the High Court in *Verwayen* to impose such a requirement. Mason CJ appeared to leave it out of his unified estoppel deliberately, Brennan J did not raise it, Deane J seemed to contemplate a range of situations in which it was not required, or could be imputed, and Dawson J also did not seem to require it.

Unfortunately, the only conclusion one can draw from those decisions is that there is little agreement as to what is required to satisfy the unconscionability element. No doubt many would regard that as a good thing, on the basis that the element of unconscionability should not be defined, but should, by some mysterious process, be divined from the facts of each case. The element of mystery is, however, unsatisfactory from the point of view of a person who wishes to know whether they are free to resile from an assumption which they

[142] Ibid 460.
[143] Ibid 500.

have induced another party to adopt or whether, having resiled from such an assumption, they have incurred liability to that other party. It is equally unsatisfactory from the point of view of a person who has relied to their detriment on the conduct of another party, and wishes to know whether they have a cause of action against that party. The High Court has recently removed one element of mystery from this area of the law by articulating the principles by which relief is framed to give effect to an equitable estoppel.[144] While that clarification is a positive development, it also serves to highlight how unfortunate it is that this important question in relation to the establishment of an equitable estoppel remains so elusive.

III. RECONCILING THE DIFFERENCES

A. *When is a Representor's Conduct Unconscionable?*

If the common law and equitable doctrines of estoppel are to be reconciled, then the courts must abandon the notion of an undefined 'unconscionability' element, and must clearly articulate the circumstances in which an estoppel will arise. Despite the diversity of views examined in this chapter, there is now considerable agreement as to the central elements required to establish both common law and equitable estoppel. At the heart of both the common law and equitable doctrines are the elements of an assumption, inducement and detrimental reliance. A number of alternatives have been suggested as to what else, if anything, is required to make the representor's conduct unconscionable in the case of the equitable doctrine. They include the reasonableness of the representee's reliance, an intention to induce reliance, actual knowledge of reliance, imputed knowledge of reliance or a reasonable expectation of reliance. Reasonableness of reliance can, however, be left to one side, since it is clearly required in all cases of common law estoppel and equitable estoppel.[145] The only remaining question, then, is when knowledge of the representee's detrimental reliance, or an intention to induce reliance, are required to make departure from an assumption

[144] *Verwayen* (1990) 170 CLR 394; see further Chapter 7 below.
[145] See Chapter 5 above.

unconscionable. The answer to that question must be: only in cases of estoppel by silence.

The proposition that knowledge of, or an intention to induce, reliance should be required only in cases where the representor has remained inactive is consistent with most of the cases at common law and in equity. It is clear that the representor must bear some responsibility for the representee's adoption of the relevant assumption, or for the action taken by the representee on the faith of that assumption.[146] Where the representor has engaged in some active conduct which clearly indicates that a particular factual or legal state of affairs exists, or clearly indicates that the representor will engage in some conduct in the future, then the representor bears responsibility for the representee's adoption of the assumption by reason of that conduct alone. Such responsibility exists regardless of the representor's knowledge or intention; in those cases, therefore, reasonable reliance alone warrants protection. On the other hand, where the representor has not engaged in any positive conduct which induces the adoption of the assumption, then the representor can only be held liable if he or she has culpably remained silent.[147] The representor's silence is only blameworthy if the representor is under a duty to speak arising from custom or trade usage,[148] or

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[146] As Kerr LJ said on behalf of the English Court of Appeal in *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte (The "August Leonhardt")* [1985] 2 Lloyd's Rep 28, 34-5: 'All estoppels must involve some statement or conduct by the party alleged to be estopped on which the alleged representee was entitled to rely and did rely.'

[147] *Ettershank v Zeal* (1882) 8 VLR (E) 333, 343 (FC): 'It is considered [in equity and at law] that a man is bound to disclose his rights if he knows that another man will be injuriously misled by their concealment.' See also *Brand v Chris Building Co Pty Ltd* [1957] VR 625, 628-9, where the defendant failed to make out a case of estoppel by acquiescence because the plaintiff was not aware of the defendant's mistake or acts of reliance; *Marvon Pty Ltd v Yulara Development Co Ltd* (1989) 98 FLR 358, 351, where Kearney J held that, even if the facts did not establish that there was an active inducement by the defendant, the defendant should be held to have induced the assumption because it knew of the plaintiff's detrimental reliance and remained silent; and *KMA Corporation Pty Ltd v G & F Productions Pty Ltd* (1997) 38 IPR 243, where Eames J held that an estoppel could not arise by silence unless, *inter alia*, the representor knew of the representee's mistaken assumption.

[148] Parke B observed in *Freeman v Cooke* (1848) 2 Ex 654; 154 ER 652, 663 that 'a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect' as a representation. An example of such a duty is that owed by customers to their bankers to disclose forgeries: *Greenwood v Martins Bank Ltd* [1933] 1 AC 51. See further Spencer Bower and Turner, above n 12, 55-79, *Thomas Australia Wholesale Vehicle Trading Co Pty Ltd v Marac Finance Australia Ltd* [1985] 3 NSWLR 452. It seems that in such cases the representor need not necessarily know of or intend reliance by the representee (as the representor did in *Greenwood v Martins Bank Ltd*), but must know or believe that the representee labours under a mistake: *West v Commercial Bank of Australia Ltd* (1935) 55 CLR

remains silent with the intention of the representee acting upon the faith of a mistaken assumption, with knowledge of the representee's intention to act upon the faith of such an assumption, or with knowledge of the representee's acts of reliance.[149] The representor's knowledge and intention should, therefore, be relevant only in a case where the representor has not actively induced the adoption of the relevant assumption by the representee.

An analogy can be drawn here between estoppel and misleading or deceptive conduct under s 52 of the Trade Practices Act (Cth) 1974.[150] The act of remaining silent is only regarded as 'conduct', and hence can only breach s 52, if it is 'otherwise than inadvertent'.[151] In other words, silence can only breach s 52 if it is conscious or deliberate. Similarly, the act of remaining silent can be said only to found an estoppel if it is engaged in consciously, with the knowledge that the representee is acting on the faith of a false assumption to his or her detriment, or with the intention or expectation that he or she will do so. If the representor remains silent, but does not have actual or constructive knowledge of the representee's reliance, then the representor cannot be regarded as bearing any responsibility for the loss suffered by the representee as a result of that reliance.

As a result of the difference between the treatment of positive conduct and that of silence under s 52, the question whether it was positive conduct or silence which led the plaintiff into error assumes great importance.[152] Similarly, if the requisite knowledge or intention is required only in the case of estoppels by silence, then,

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515, 322 (Rich, Starke, Dixon and McTiernan JJ); *Thompson v Palmer* (1933) 49 CLR 507, 547 (Dixon J).

[149] Note that knowledge of the representee's acts of reliance will not suffice if the representor does not also have knowledge of the assumption adopted by the representee and there are other plausible explanations for the representee's actions: *Wilson v Stewart* (1889) 15 VLR 781, 802 (Higinbotham J).

[150] It is also interesting to note that the 'reasonable expectation' test recently adopted by the Full Federal Court for determining whether silence in a particular situation is misleading or deceptive (*Warner v Elders Rural Finance Ltd* (1992) 113 ALR 517) is essentially the same as the test applied in *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890, 903, *Pacol Ltd v Trade Lines Ltd* (the 'Herick Sif') [1982] 1 Lloyd's Rep 456, 465 and *KMA Corporation Pty Ltd v G & F Productions Pty Ltd* (1997) 38 IPR 243, 249 for determining whether silence in a particular situation is capable of forming the basis of an estoppel.

[151] Trade Practices Act (Cth) 1974, s 4(2); see Andrew Robertson, 'Silence as Misleading Conduct: Reasonable Expectations in the Wake of Demagogue Pty Ltd v Ramensky' (1994) 2 *Competition and Consumer Law Journal* 1, 12-14.

as under s 52, it is crucial for the courts to determine whether it is positive conduct or silence on the part of the representee which induced the representee to adopt or act on the relevant assumption. In *Crabb v Arun DC*, for example, had the representor's positive conduct been regarded as insufficient on its own to have induced reliance, then it would have been critical for the representee to establish the requisite knowledge or intention on the part of the representor.

B. *The Nature and Type of Knowledge or Intention Required*

If one accepts the view outlined above, that knowledge or intention is only required in the case of an estoppel by silence, then the final question that needs to be addressed is the nature and type of knowledge or intention required. The relevant questions are, first, what must the representor know or intend and, secondly, must actual knowledge or intention be proved, or will it be imputed to the representor by the court?

Knowledge of three different matters may be relevant: first, knowledge of the assumption adopted by the representee, secondly, knowledge that the assumption is false (ie: knowledge that the representee is mistaken as to the state of affairs, as to the representee's existing legal rights or as to the intentions of the representor); and, thirdly, knowledge of the representee's acts of detrimental reliance.[153] It seems clear that in all cases the representor must know of the assumption adopted by the representee. If the representor did not, by his or her conduct, induce the adoption of the relevant assumption, and did not know of the assumption adopted by the representee, then the representor cannot be said to bear any responsibility for the loss suffered by the representee as a result of reliance on the assumption.

The time for assessing the representor's knowledge is a difficult question. Since the representor is said to act wrongfully or unconscionably only in resiling from the assumption, it could be argued that there is no reason to require knowledge of the true position at any time prior to the representor's attempt to resile from the

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[152] See Robertson, ibid.
[153] *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133, 146.

assumption. On the other hand, if the representor only learns of the representee's assumption after the detrimental action has been taken, then the representor is powerless to prevent the detrimental action. If the representor has not induced the adoption of the relevant assumption by positive conduct, and did not know of it before it was acted upon, then the representor cannot be said to bear responsibility for the consequences of the representee's actions.[154] Accordingly, it seems clear that in a case of estoppel by silence, the representor must know of the representee's assumption at the time detrimental action is taken. Accordingly, what the representee must establish is that, at the time the representee acted on the assumption, the representor:

1. knew of the assumption adopted by the representee; and
2. (a) knew that the representee was acting in reliance on the assumption, (b) knew of the representee's intention to act in reliance on that assumption,[155] or (c) intended the representee to act in reliance on the assumption.

The final question is whether the requisite knowledge or intention must be proved by direct evidence, or whether constructive or imputed knowledge will suffice. There is authority in the common law cases for the proposition that direct proof of the requisite knowledge or intention is not required, and it will be inferred from the facts. The leading case is *Laws Holdings Pty Ltd v Short*,[156] where Gibbs J was prepared to infer knowledge where 'it was so obvious' that the representee would have adopted the assumption in question that the representor must have believed this was the case. As to the question of the representor's intention to induce a course of conduct, there is clear authority at common law

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[154] As Spencer Bower and Turner, above n 12, 64 have observed, an owner of property is under no duty to protest against an invasion of his or her rights where the owner has no reason to believe that the invader mistakenly believes himself or herself to be acting lawfully. In such a case there is no 'delusion' which the owner is fostering or encouraging, and accordingly, there is nothing to preclude the owner from subsequently asserting his or her rights against the invader.

[155] See *Crabb v Arun District Council* [1976] 1 Ch 179, 189 (Lord Denning MR), 197-8 (Scarman LJ) and *Laws Holdings Pty Ltd v Short* (1972) 46 ALJR 563, 570 (Gibbs J).

[156] (1972) 46 ALJR 563, 571 (Gibbs J), applied in *Ampol Ltd v Matthews* (Full Court of the Supreme Court of South Australia, Millhouse, Zelling and Legoe JJ, 15 April 1992), 164 LSJS 78, 11 (Millhouse J), 21 (Zelling J).

that such intention can also be implied from the facts.[157] Brennan J confirmed in *Waltons Stores* that the requisite knowledge or intention can also be inferred for the purposes of equitable estoppel, but suggested that such an inference may be more difficult to draw in a case of estoppel by silence.[158]

The question whether some notice other than actual notice suffices for the establishment of an estoppel is an important one for the philosophy of estoppel. That is because a more stringent approach to notice involves a focus on the representor and indicates a concern with matters of conscience. A less strict approach to notice, on the other hand, tends to suggest that the court is more concerned with the position of the representee and is simply protecting reasonable reliance.[159] The importance of the standard of notice required has also been recognised by Tony Duggan in relation to the equitable doctrine of unconscionable dealing. Duggan suggests that:

> Attenuation of the knowledge requirement in this way [to allow constructive notice] marks an important shift in the philosophical underpinnings of the unconscientious dealing doctrine. Relief of A's misfortune replaces prevention of B's wrongdoing as the basis for intervention.[160]

A person is said to have constructive notice of a fact or state of affairs which would have been revealed by inquiries. There are two ways in which a person can be deemed to have such notice.[161] Constructive notice in the narrow sense is wilful ignorance: deliberately abstaining from inquiry in order to avoid knowledge. Constructive notice in the broad sense involves a mere failure to make the inquiries that a reasonable person would have made in the situation in question. It seems clear that constructive notice in the narrow sense should be

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[157] *Trenorden v Martin* [1934] SASR 340, 343; see above nn 13-22 and accompanying text.
[158] (1988) 164 CLR 387, 423.
[159] See above n 111 and accompanying text.
[160] Tony Duggan, 'Unconscientious Dealing' in Patrick Parkinson (ed), *The Principles of Equity* (1996) 121, 139.
[161] Duggan, ibid 138; RP Meagher, WMC Gummow and JRF Lehane, *Equity: Doctrines and Remedies* (3rd ed, 1992) 253.

sufficient to establish an estoppel. Wilful ignorance is, as Tony Duggan has observed, a type of dishonesty;[162] it therefore clearly affords a sufficient basis for attributing responsibility to the representor for the representee's reliance. Justice Oliver's suggestion in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* that 'a suspicion of the true position' may give rise to a duty to speak arguably provides support for the notion that constructive notice in the narrow sense will be accepted for the purposes of equitable estoppel.[163]

For the purposes of the equitable doctrine, a strong case can also be made for allowing constructive knowledge in the broad sense of a mere failure to make reasonable inquiries, or a finding that the representor ought to have known of the representee's assumption and detrimental reliance. The authors of *Cheshire and Fifoot's Law of Contract* argue that an objective test should be applied, as it is in the area of unconscionable dealing,[164] so that it is enough to show that 'a reasonable person would have realised that there would be detrimental reliance.'[165] That argument finds support in the *dictum* of Mason CJ and Wilson J in *Waltons Stores* that the requisite unconscionability can be found in the representor's reasonable expectation of detrimental reliance by the representee.[166] It is also supported by the approach taken by the New South Wales Court of Appeal in *Lorimer v State Bank of New South Wales*, which was discussed earlier in this chapter.[167] As the above statement from *Cheshire and Fifoot* suggests, a

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[162] Duggan, above n 160, 138.
[163] [1982] 1 QB 133, 17.
[164] *Commonwealth Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462 & 467 (Mason J), 474 & 477-9 (Deane J), discussed by Seddon and Ellinghaus, above n 2, 560-1. Cf Duggan, above n 160, 138.
[165] Seddon and Ellinghaus, above n 2, 66.
[166] (1988) 164 CLR 387, 406. Deane J also commented in *Verwayen* (1990) 170 CLR 394, 445, that 'a critical consideration [in determining whether departure from the assumption would be unconscionable] will commonly be that the allegedly estopped party knew or intended *or clearly ought to have known* that the other party would be induced by his conduct to adopt, and act on the basis of, the assumption' (emphasis added). In two 19th century cases Lord Cranworth regarded a form of constructive notice of reliance as sufficient, but he was referring to cases in which the assumptions were induced by positive representations. In *West v Jones* (1851) 1 Sim (NS) 205; 61 ER 79, 81 Lord Cranwoth VC held that a representor will be bound by a statement 'if it be made in order to induce another to act upon it, or under circumstances in which the party making it may reasonably suppose it will be acted on'. In *Jorden v Money* (1854) 5 HLC 185; 10 ER 868, 881, Lord Cranworth LC reiterated that 'if the representee has unwittingly misled another, you must add that he has misled another under such circumstances that he had reasonable ground for supposing that the person whom he was misleading was to act upon what he was saying.'
[167] Above nn 45-51 and accompanying text.

knowledge requirement which allows constructive knowledge in the broad sense is almost indistinguishable from a requirement that the promisor must reasonably expect reliance by the promisee.[168] Framing it as a 'reasonable expectation of reliance' requirement, rather than as a knowledge requirement which can be satisfied by constructive notice, is simpler, and allows a consistent approach to be taken at common law and in equity. Accordingly, if constructive notice in the broad sense is accepted, then we have two different 'reasonableness' requirements for estoppel. Where the estoppel is claimed to arise from positive conduct on the part of the representor, then it is only required that the representee must act reasonably in adopting and acting upon the assumption. Where the estoppel is claimed on the basis of the representor's silence, then it must *also* be shown that a reasonable person in the position of the representor would have expected reliance.

If that approach is accepted, then the above list of elements[169] can be restated as follows. In the case of an estoppel by silence, in addition to the basic elements required to establish an equitable estoppel by positive conduct, the onus should be on the representee to establish that, at the time the representee took the detrimental action, the representor:

1. knew (or ought to have known) of the assumption adopted by the representee; and
2. (a) knew (or ought to have known) that the representee was acting in reliance on that assumption, (b) knew (or ought to have known) of the representee's intention to act in reliance on the assumption, or (c) intended the representee to act in reliance on the assumption.

If emphasis is to be placed on the representee's reliance, rather than the representor's conduct, and a consistent approach is to be taken at common law

[168] The notion that liability should be imposed on a person who 'ought to have realised' that their actions would induce reliance has been justified from a philosophical point of view by Neil MacCormick, 'Voluntary Obligations and Normative Powers I' (1972) Supp Vol 46 *The Proceedings of the Aristotelian Society* 59, 66-7.
[169] Above, text accompanying n 155.

and in equity, then the knowledge and intention requirements could be simplified. In the case of any estoppel by silence, then, the only extra requirement imposed on a representee would be to show that a reasonable person in the position of the representor would have expected the representee to adopt the relevant assumption and to act in reliance upon it.

IV. CONCLUSIONS

The role and nature of the unconscionability requirement are important issues which must be resolved if the unification of common law and equitable estoppel is to proceed. There are considerable similarities between equitable and common law estoppel in this regard. First, knowledge has played an important role in each doctrine in attributing responsibility to the representor in cases where he or she has not made a clear representation or promise. There is, in that respect, a unity of principle between the common law and equitable doctrines. Secondly, the notion of unconscionable conduct in the equitable doctrine can be seen to be reflected in the common law concept of unjust departure from an assumption. Each depends primarily on the elements of inducement on the representor's side, and reasonable detrimental reliance on the part of the representee. The similarity between those two concepts, however, masks a fundamental difference. While the notion of unjust departure under the common law doctrine has always been defined clearly, the concept of unconscionability in the equitable doctrine has deliberately been left undefined. This is a significant difference between the common law and equitable doctrines which must be resolved if a unified doctrine is to be accepted.

The nature of the unconscionability requirement is closely connected with the philosophy of estoppel. There are different ways of interpreting the unconscionability requirement and a choice between those different requirements appears to depend, in turn, on a choice between the contending philosophies. If estoppels by conduct are indeed seen to be based on conscience, then the unconscionability requirement should be a demanding one, which requires actual knowledge of the representee's reliance. If, on the other hand, estoppels by conduct are seen to be based on reliance, then an objective

approach, such as requiring a reasonable expectation of reliance, should be regarded as sufficient. As Parker and Drahos have suggested,[170] the apparent tendency of the Australian courts toward the acceptance of constructive knowledge in the establishment of both common law and equitable estoppel suggests that estoppels by conduct in Australia are founded on, or moving towards, a reliance-based philosophy. If the essence of the unconscionability requirement, the question of knowledge, is determined objectively, then it seems clear that the principles of estoppel by conduct are not based on conscience.

[170] Parker and Drahos, above n 111 and accompanying text.

Chapter 7

REMEDIES*

The final aspect of estoppel doctrine to be examined is the way in which the courts give effect to common law, equitable and unified estoppels. In the case of the equitable and unified doctrines this is properly described as a discussion of remedies, since those doctrines create substantive rights. The remedy is therefore at large, and the court must fashion relief by which to give effect to the estoppel. In the case of the common law doctrine, on the other hand, judges and commentators do not normally speak of remedies, since the effect of the estoppel is merely preclusionary: it is to hold the parties to the assumed state of affairs and to determine their rights by reference to that state of affairs. Although the effect of common law estoppel is in this sense fixed, it is important to pay close attention to the 'remedy' provided by common law estoppel, particularly in the light of moves towards a unification of the common law and estoppel doctrines of estoppel.

This chapter will consider the question of remedies in four parts. The first part of the chapter will examine in the abstract the different types of remedies that can be provided to give effect to an estoppel, and the different approaches that can be taken to the question of relief. The remainder of the chapter will consider the way in which the courts give effect to the different types of estoppel: part two deals with common law estoppel, part three equitable estoppel, and part four a unified estoppel.

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* Substantial parts of this chapter have been published in 'Satisfying the Minimum Equity: Equitable Estoppel Remedies after *Verwayen*' (1996) 20 *Melbourne University Law Review* 805-847 and 'Towards a Unifying Purpose for Estoppel' (1996) 22 *Monash University Law Review* 1-29.

I. APPROACHES TO THE DETERMINATION OF RELIEF

There are essentially three different types of relief which can be granted to give effect to an estoppel: a court can grant reliance-based relief, expectation-based relief or restitutionary relief. These three types of relief coincide with the reliance, expectation and restitution interests identified by Fuller and Perdue in their classical exposition of contract damages.[1]

In granting damages to a plaintiff for breach of contract, a court is said to protect the plaintiff's reliance interest when those damages are calculated to undo the harm suffered by the plaintiff as a result of his or her reliance on the defendant's promise.[2] In protecting the reliance interest, the court seeks to put the plaintiff in the position he or she would have occupied had the contract not been entered into. Similarly, in giving effect to an estoppel, the court grants reliance-based relief when the remedy granted reverses the detriment the representee has suffered as a result of the representee's reliance on the representor's conduct. The most direct means of protecting the representee's reliance interest is to order the payment of monetary compensation for the detriment suffered by the representee in reliance on the relevant assumption.[3] The court can also protect the reliance interest by granting a lien or charge over the representor's property to the value of expenditure incurred by the representee in reliance on the relevant assumption.[4]

The expectation interest is protected in an award of contract damages which gives the plaintiff the value of the expectancy created by the promise.[5] The award is calculated to put the plaintiff in as good a position as he or she would

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[1] LL Fuller and William Perdue 'The Reliance Interest in Contract Damages: 1' (1936) 46 *Yale Law Journal* 52.

[2] Ibid 54.

[3] As proposed in *Commonwealth v Verwayen* (1990) 170 CLR 394, 431 (Brennan J), 504 (McHugh J) and granted in *Adore Pty Ltd v Blenkinsop Nominees Pty Ltd* (Supreme Court of Western Australia, Malcolm CJ, 1 September 1993) and *The Public Trustee, as Administrator of the Estate of Williams (dec'd) v Wadley* (Full Court of the Supreme Court of Tasmania, Wright, Crawford and Zeeman JJ, 27 June 1997).

[4] As, for example, in the proprietary estoppel cases *The Unity Joint Stock Mutual Banking Association v King* (1858) 25 Beav 72; 53 ER 563 and *Morris v Morris* [1982] 1 NSWLR 61.

have occupied if the defendant had performed his or her promise. The expectation interest can also be protected by an order for specific performance of a contractual obligation, giving the plaintiff the expectancy *in specie*, rather than its monetary equivalent. The representee's expectation interest is also commonly protected in estoppel cases, when the court grants relief which has the effect of fulfilling the representee's assumptions or expectations. In the case of an estoppel arising from an assumption as to an existing fact, the court can do this by holding the representor to the assumed state of affairs and determining the rights of the parties by reference to those assumed facts, rather than the facts as proved. Where the assumption on which the estoppel is based relates to the future conduct of the representor, the court can grant expectation-based relief in a number of different ways. The expectation interest is protected when the court orders specific performance, or payment of damages in lieu of specific performance, of an unexecuted agreement which the representee promised would be executed.[6] It is also protected where the court refuses to allow the representor to depart from a representation as to future conduct,[7] orders the representor to transfer to the representee a promised or expected interest in land,[8] or orders the representor to pay monetary compensation to the representee calculated by reference to the value of the expectancy.[9]

An important point to note about the reliance and expectation interests is that they are often overlapping, in the sense that protection of the expectation interest will usually also protect the reliance interest. The granting of full expectation relief ensures that no detriment is suffered as a result of the representee's reliance, because the representee receives the benefits that he or

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[5] Fuller and Perdue, above n 1, 5.

[6] As, for example, in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, where damages were awarded in lieu of specific performance of a lease which the representor had led the representee to believe would be executed.

[7] As, for example, in *Commonwealth v Verwayen* (1990) 170 CLR 394, where the representor was prevented from pleading defences which the representee was led to believe would not be pleaded.

[8] As, for example, in *Dillwyn v Llewelyn* (1862) 4 De GF & J 517; 45 ER 1285, where the representor was ordered to transfer to the representee the land which the representee was led to believe would be transferred to him.

she was counting on receiving.[10] Indeed, as Fuller and Perdue have observed in the contractual context, the value of the expectancy offers 'the measure of damages most likely to reimburse the plaintiff for the (often very numerous and difficult to prove) individual acts and forbearances which make up his total reliance on the contract.'[11]

The third interest the court can protect in granting contract damages is the restitution interest. The plaintiff's restitution interest is protected in an award of contract damages when the court forces the defendant to disgorge or pay for a gain received at the expense of the plaintiff.[12] Restitutionary remedies are not often granted in estoppel cases. Courts giving effect to estoppels almost invariably fashion relief with a view to fulfilling the representee's expectations or protecting the representee's reliance interest, rather than with a view to disgorging gains made by the representor. Restitutionary remedies have occasionally been granted in promissory estoppel cases in the United States,[13] and have been awarded to give effect to equitable estoppels in at least two cases in Canada,[14] and one in Australia.[15] The Australian decision has rightly been

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[9] As, for example, in *Baker v Baker* (1993) 25 HLR 408, where the representee was held to be entitled to compensation equivalent to the value of the accommodation he expected to receive, which was less valuable than the expenditure he incurred on the faith of that expectation.

[10] While it will often be double counting to protect both the reliance and expectation interests of the representee, the protection of the expectation interest will not cover reliance loss if the expectation is calculated as the net benefit which the representee expected to receive. An estoppel might, for example, arise where a representee expends money in reliance on the assumption that the representor will award the representee a contract for which the representee has tendered. If the representee's expectations are fulfilled by means of an award of compensation for lost net profit, then such an award will not cover the representee's reliance loss.

[11] Fuller and Perdue, above n 1, 60. There are, however, rare cases such as *Baker v Baker* (1993) 25 HLR 408, in which the value of the representee's detrimental reliance (giving up rented accommodation and contributing £33,950 towards the defendants' purchase of a house) was of greater value than his expectancy (that he would have a right to reside in a room in the defendants' house rent-free for the rest of his life).

[12] Fuller and Perdue, above n 1, 53-4.

[13] LL Fuller and William Perdue, 'The Reliance Interest in Contract Damages: 2' (1936) 46 *Yale Law Journal* 373, 405; Edward Yorio and Steve Thel, 'The Promissory Basis of Section 90' (1991) 101 *Yale Law Journal* 111, 132 (n 129).

[14] *McBride v McNeil* (1912) 9 DLR 503 (representee allowed a lien for the 'increased selling value' of improved property); *The Queen v Smith* (1980) 113 DLR (3d) 522 (representee awarded compensation for the amount by which the value of land was enhanced by improvements).

[15] In *Raffaele v Raffaele* [1962] WAR 29 the defendants promised their son that, if he would build a house on a block of land adjacent to the one on which they lived, they would transfer

criticised, however,[16] and can properly be regarded as anomalous because the prevention of unjust enrichment is not regarded as the purpose of equitable estoppel.[17] Although equitable estoppel, particularly proprietary estoppel, can at times have the effect of preventing unjust enrichment,[18] doing so has not been seen as the one of the functions of equitable estoppel in England or Australia.[19] In many estoppel cases there will be no restitutionary interest to protect, because the representor will not have made a gain at the representee's expense.[20]

As well as characterising different *types of remedies* which can be granted to give effect to an estoppel, the concepts of reliance, expectation and restitution can also be used to describe the *approaches* a court can take in giving effect to an estoppel, indicating the interest which is given primacy in the determination of relief. As this chapter will show, the application of a particular approach to relief does not necessarily lead to the granting of a particular type of remedy, but simply provides a purpose to be pursued in granting relief, and a starting

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that block to him. Applying *Dillwyn v Llewelyn* (1862) 4 De GF & J 517; 45 ER 1285, D'Arcy J held that the son's expenditure on the strength of the promise gave rise to a 'notional contract'. He awarded damages for breach of that contract, calculated on a restitutionary basis, representing the value of the house acquired by the defendants exclusive of the land on which it was built.

[16] Two commentators have suggested that D'Arcy J erred in awarding damages on a restitutionary basis in *Raffaele v Raffaele* and that damages should have been assessed on a reliance basis or an expectation basis: D Allan, 'An Equity to Perfect a Gift' (1963) 79 *Law Quarterly Review* 238, 239 (n 7); KCT Sutton, *Consideration Reconsidered* (1974) 67 (n 118).

[17] The connection between the purpose of a doctrine and its remedial consequences will be discussed in Chapter 8 below.

[18] In *Sledmore v Dalby* (1996) 72 P & CR 196, 208, Hobhouse LJ noted that the element of restitution is often present in proprietary estoppel, in contrast to common law estoppel.

[19] See Joshua Getzler, 'Unconscionable Conduct and Unjust Enrichment as Grounds for Judicial Intervention' (1990) 16 *Monash University Law Review* 283, 309-314. Sir Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238, 255 has indicated, however, that unjust enrichment may have a role to play in proprietary estoppel, and Mark Lunney, 'Towards a Unified Estoppel: The Long and Winding Road' [1992] *The Conveyancer and Property Lawyer* 239, 244 has suggested that the element of unjust enrichment may be a factor that could be taken into account in proprietary estoppel cases in deciding whether a representor's conduct is unconscionable.

[20] Unjust enrichment does appear to play a limited role in the determination of relief in the United States, in those cases where the promisor has been unjustly enriched at the expense of the promisee: see below n 177.

point or *prima facie* position in relation to remedy.[21] Relief is determined on a *reliance-basis* when the court, in fashioning a remedy, seeks to reverse any detriment suffered by the representee as a result of his or her reliance on the assumption induced by the representor. Relief is determined on an *expectation basis* when the purpose pursued by the court is to make good the assumption adopted and acted upon by the representee. Relief would be determined on a *restutitionary basis* if a court sought to reverse any gains made by the representor as a result of the representee's reliance on the representor's conduct.

A fourth approach to giving effect to an estoppel is to fashion relief which is appropriate in the circumstances to assuage the representor's conscience. Relief is determined on a *conscience basis* when the court's primary concern is to grant relief which reflects the unconscionability of the representor's conduct. A conscience-based approach to relief has occasionally been advocated in connection with equitable estoppel in Australia, in order to give greater prominence to the role of unconscionability in the doctrine. In an essay written prior to the High Court's decision in *Waltons Stores (Interstate) Ltd v Maher*,[22] Paul Finn outlined an unconscionability-based approach to relief in equitable estoppel.[23] Finn argued that, in moulding relief, the courts must have regard to the conduct of the representor, in addition to concerns with the detriment suffered by the representee.[24] According to Finn, therefore, the remedy revolves around 'what, in the circumstances it would be unconscionable for the [representor] to

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[21] So, for example, a reliance-based approach to relief will not necessarily result in the granting of relief framed by reference to the reliance interest, such as damages or compensation for loss suffered as a result of the representee's reliance. Other factors, such as the difficulty in quantifying loss, may require the granting of a different type of relief (such as expectation relief) in order to achieve the stated purpose of preventing harm. Similarly, if an expectation-based approach is adopted, there will be cases in which the representee's expectations cannot be fulfilled, such as in *Baker v Baker* (1993) 25 HLR 408, where the representee's assumption that he could reside in a house with the representors for the rest of his life could not be made good because of a breakdown in the relationship between the parties.

[22] (1988) 164 CLR 387 ('*Waltons Stores*').

[23] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (1985) 57, 90-3.

[24] Ibid 91-2.

insist upon given the responsibility he bears in or for the [representee's] actions.'[25]

On that basis, Finn made some 'tentative suggestions' to explain the granting of relief, which divided the cases into three categories, essentially on the basis of the extent of the representor's responsibility for the assumption adopted by the representee. So, if the representor positively encourages the adoption of the assumption, according to Finn, the assumption should be made good. Where the representor stands by with knowledge of the mistaken assumption, the court's concern should be to ensure that the representor does not obtain any benefit from the representee's actions. Thirdly, where the representor encourages the representee to believe that certain rights of the representor will not be exercised, then the court should be concerned to impose terms that will allow the representor to insist on those rights, while preventing any disadvantage accruing to the representee.[26]

Finn's approach was clearly based primarily on the proprietary estoppel cases, and could not have anticipated the direction the High Court was to take in relation to equitable estoppel relief in *Waltons Stores* and *Commonwealth v Verwayen*.[27] The approaches to relief in those cases, as will be discussed below, indicate that any reference to unconscionability in the determination of relief is a reference to the unfairness of departing from an assumption where to do so would cause detriment to the representee as a result of the representee's reliance on that assumption.[28] The notion of unconscionability has not been used, as Finn proposed, to shape relief by reference to the reprehensibility of the representor's conduct.[29] Nevertheless, Finn's analysis is interesting because it suggests a means

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[25] Ibid 92.

[26] Ibid 92-3.

[27] (1990) 170 CLR 394 ('*Verwayen*').

[28] See, eg: *Waltons Stores* (1988) 164 CLR 387, 423 (Brennan J); *Verwayen* (1990) 170 CLR 394, 411 (Mason CJ), 428-9 (Brennan J), 501 (McHugh J)

[29] Wright J observed in *Blazely v Whiley* (1995) 5 Tas R 254, 277 that '[m]oral indignation at the plaintiff's shabby treatment of his younger relatives whilst assuming the guise of their benefactor does not enter into the equation' as to how relief should be framed.

by which the courts could take the unconscionable nature of the representor's conduct into account in determining relief.[30]

II. COMMON LAW ESTOPPEL

To the extent that common law estoppel can be said to provide a remedy, it is clearly an expectation-based remedy that is provided. While both detrimental reliance and unfair conduct are required to establish an estoppel at common law, the effect of such an estoppel is not determined by reference to the detriment suffered in reliance on the relevant assumption, and nor is it concerned with notions of unconscionability.[31] According to Brennan J in *Waltons Stores*, 'the effect of an estoppel in pais ... is to establish the state of affairs by reference to which the legal relationship between [the parties] is to be established.'[32] As discussed in Chapter 1, when common law estoppel is applied in relation to assumptions of existing legal rights, its effect is to prevent the representor from denying the existence of those rights.

Although the avoidance of detriment has for some time been seen as the 'basal purpose' of the common law doctrine of estoppel,[33] the remedy provided by the doctrine is less than precise in its fulfilment of that purpose. Common law estoppel operates to avoid detriment by preventing the estopped party from departing from the relevant assumption, or by compelling that party to adhere to it.[34] As Dawson J made clear in *Verwayen*,[35] it is for historical, rather than

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[30] It should be noted that, since *Verwayen*, at least two commentators have suggested that the reprehensibility of the representor's conduct should be taken into account in determining relief. Alec Leopold, 'Estoppel: A Practical Appraisal of Recent Developments' (1991) 7 *Australian Bar Review* 47, 59 has suggested that a more extensive remedy should be given in cases of 'extreme unconscionability', such as where the encouragement offered by the representor is extensive and of lengthy duration. MJ Tilbury, *Civil Remedies* (vol 2, 1993) 277 has also suggested that generally a plaintiff will be unlikely to be limited to the recovery of reliance loss where the defendant has positively encouraged the plaintiff's reliance.

[31] A common law estoppel will, however, usually have the *effect* of protecting the representee's reliance interest and could be said to purge the representor's conscience.

[32] (1988) 164 CLR 387, 414.

[33] *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674 (Dixon J).

[34] Ibid.

[35] (1990) 170 CLR 394, 453-4. See also Mark Lunney, 'Towards a Unified Estoppel—The Long and Winding Road' [1992] *The Conveyancer and Property Lawyer* 239, 241-2.

practical, reasons that the aim of common law estoppel has been pursued by the 'crude expedient'[36] of fulfilling the relevant assumption. The 'basal purpose' identified by Dixon J could, of course, be fulfilled more precisely by providing a remedy which serves only to prevent or reverse the detriment suffered by the representee.

Mark Lunney has suggested that the result of the 'all or nothing'[37] nature of common law estoppel is that 'the party misled may recover more than the actual loss suffered by that party.'[38] That argument assumes, however, that 'actual loss' is limited to reliance loss and does not include the loss of an expectation. The remedy provided by common law estoppel simply protects the representee against expectation loss as well as reliance loss. The loss of an expectation is no less 'actual' in the case of estoppel than in the case of a breach of contract, although, as will be discussed in Chapter 8, the policy reasons for protecting against expectation loss are far weaker in estoppel cases than in contract cases.

In *Avon County Council v Howlett*,[39] the English Court of Appeal gave some consideration to the question whether there is any flexibility available to a court giving effect to an estoppel at common law. The case was discussed in Chapter 1 to illustrate the difference between the effects of common law and equitable estoppel. It will be recalled that the plaintiff council paid wages to the defendant, its employee, to which the defendant was not entitled. In response to the defendant's inquiries about the payments, the plaintiff made representations which led the defendant to believe that he was entitled to treat the money as his own. On the faith of that belief, the defendant expended some of the money on things he would not otherwise have bought, and omitted to claim social security benefits to which he would have been entitled. The trial judge admitted evidence which satisfied him that the defendant had spent all of the money but, at the request of the parties, decided the case on the facts pleaded by the defendant,

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[36] Finn, above n 23, 91.

[37] *Verwayen* (1990) 170 CLR 394, 454 (Dawson J).

[38] Lunney, above n 35, 241, citing *Greenwood v Martins Bank Ltd* [1932] 1 KB 371 and *Avon County Council v Howlett* [1983] 1 All ER 1073.

[39] [1983] 1 All ER 1073.

which revealed a change of position equivalent in value to only half of the plaintiff's claim.[40] The trial judge held that the plaintiff's claim to recover the moneys was barred only to the extent of the sum spent and the benefits forgone. The effect of the estoppel was not, therefore, to hold the representee to the represented state of affairs, but simply to prevent the representee from suffering detriment as a result of his reliance on the representor's conduct.

The defendant appealed from that decision in order to have the Court of Appeal consider the hypothetical question whether an estoppel at common law can operate *pro tanto*, rather than on an all or nothing basis. The notion that an estoppel at common law could operate *pro tanto* is clearly inconsistent with suggestions that common law estoppel is simply an evidentiary principle, which operates to hold the representee to the represented state of affairs.[41] As discussed in Chapter 1, a doctrine of estoppel that operates in a flexible way, and requires a court to fashion a remedy to suit the circumstances of the case, must logically be regarded as a source of substantive rights.

Cumming-Bruce LJ allowed the appeal on the basis that the trial judge should not have acceded to the parties' request that the case be decided on a hypothetical basis, and should have found for the defendant on the facts as proved.[42] He refused to consider the hypothetical question. Slade and Eveleigh LJJ were prepared to consider the question, however, and held that once the defendant had shown detriment resulting from reliance on the representation, the plaintiff was prevented from asserting its entitlement to the money. Accordingly, the estoppel operated to bar the whole of the plaintiff's claim.[43] This was, according to Slade LJ, a consequence of the fact that estoppel by representation was merely a rule of evidence, which operated to prevent the representor from asserting facts contrary

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[40] The case was evidently being run as a test case, in order to determine the rights of the parties where overpaid wages had been partially spent.

[41] See, eg: *Seton, Laing, & Co v Lafone* (1887) 19 QBD 68, 70 (Lord Esher MR); *Low v Bouverie* [1891] 3 Ch 82, 101 (Lindley LJ); *Re Ottos Kopje Diamond Mines Ltd* [1893] 1 Ch 618, 628 (Bowen LJ).

[42] [1983] 1 All ER 1073, 1076.

[43] Ibid 1078 (Eveleigh LJ).

to those represented.[44] In the course of his judgment, Slade LJ adverted to the problem that might arise in a case where the sum sought to be recovered by the representor was so large as to bear no relation to the detriment suffered by the representee. Slade LJ specifically left open the question whether the court would have jurisdiction in those circumstances to exact an undertaking from the representee that he or she would return to the representor any moneys remaining in the hands of the representee.[45]

It is difficult to conceive of any basis on which the court could require such an undertaking as a condition of giving effect to a principle of the common law, particularly a principle which has a limited preclusionary operation, and which is often described as evidentiary.[46] While a court of equity can require that a party seeking the court's assistance 'does equity' as a condition of granting relief,[47] no analogous principle operates at common law. This was confirmed by the Full Court of the Federal Court in *obiter dictum* in *S & E Promotions Pty Ltd v Tobin Brothers Pty Ltd*:

> The price of equitable relief may be the imposition of terms upon the successful party, on the footing that because it seeks equity it must be

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[44] Ibid 1087.

[45] Ibid 1089. Such an undertaking was voluntarily offered by a representee seeking to assert an estoppel as a defence to a restitutionary claim in *RE Jones Ltd v Waring & Gillow Ltd* [1926] AC 670. In a dissenting judgment in the House of Lords, Viscount Cave LC appeared to regard such an undertaking as a necessary precondition to allowing the estoppel to be asserted. Sir Robert Goff and Gareth Jones, *The Law of Restitution* (2nd ed, 1978) 556 also suggested that such an undertaking may be required, but offered no basis in principle for requiring it. In the current edition of their work (4th ed, 1993) 750, Goff and Jones describe as 'regrettable' the position taken by the Court of Appeal in *Avon County Council v Howlett* that estoppel should be regarded as a rule of evidence. They observe, however, that the fact that the court left open the question whether an undertaking could be exacted 'destroys the credibility of the principle that an estoppel cannot operate *pro tanto*' (ibid 750, n 64). Elizabeth Cooke, 'Estoppel and the Protection of Expectations' (1997) 17 *Legal Studies* 258, 275 suggests that 'in extreme cases it is unrealistic to suppose that the court would not find itself able to order partial restitution' but also provides no basis in principle on which the court could make such an order.

[46] As discussed in Chapter 1, although common law estoppel is often described as evidentiary, it is not accurate to do so when the doctrine is applied in relation to assumptions of existing rights.

[47] *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102, 115-6 (Deane, Dawson, Toohey, Gaudron and McHugh JJ).

> prepared to do equity. There is no comparable common law precept of such wide application.[48]

The innate lack of flexibility of common law estoppel in this regard has been accepted by the High Court of Australia in a number of cases. In *David Securities Pty Ltd v Commonwealth Bank of Australia*, in a judgment which recognised a reliance-based change of position defence to restitutionary claims, the Court referred to the 'inflexibility of the related doctrine of estoppel, as evidenced by *Avon CC v Howlett* where the Court of Appeal held that estoppel could not operate pro tanto.'[49] This aspect of common law estoppel was also accepted in *Waltons Stores*[50] and *Verwayen*,[51] although those members of the High Court who accepted the existence of a unified estoppel in the latter case regarded such an doctrine as having a more sophisticated approach to relief.[52] The clearest acknowledgment of a lack of flexibility in the common law doctrine is to be found in the judgment of Mason CJ in *Verwayen*:

> Being an evidentiary principle, estoppel by conduct achieved, *and could only achieve*, the object of avoiding the detriment which would be suffered by another in the event of departure from the assumed state of affairs by holding the party estopped to that state of affairs. The rights

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[48] (1994) 122 ALR 637, 653 (Neaves, Gummow and Higgins JJ).

[49] (1992) 175 CLR 353, 385 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

[50] (1988) 164 CLR 387, 398 (Mason CJ and Wilson J indicated that the effect of a common law estoppel was that 'a party is required to abide by an assumption made by the other'), 414 (Brennan J: 'The effect of an estoppel in pais is not to create a right in one party against the other; it is to establish the state of affairs by reference to which the legal relationship between them is ascertained'), 444-5 (Deane J: an estoppel by conduct 'operates negatively to preclude the denial of, or a departure from the assumed or promised state of affairs'), 458 (Gaudron J 'Common law or evidentiary estoppel compels adherence to an assumption of fact by denying the person estopped the right to assert a contrary matter of fact').

[51] (1990) 170 CLR 394, 411 (Mason CJ), 422 (Brennan J: 'Estoppel by representation of a fact ... precludes a [representor] from asserting a right inconsistent with the fact on which the other party acted'), 454 (Dawson J: 'The result of an estoppel at common law was ... to preclude the party estopped from denying the assumption upon which the other party acted to his detriment.'), 501 (McHugh J: 'because the common law doctrine of estoppel in pais is a rule of evidence, it operates to preclude the party estopped from denying the assumption of fact whenever it is necessary to do so for the purpose of determining the rights of the parties').

[52] Ibid 415-6 (Mason CJ), 441-3 (Deane J), 487 (Gaudron J). The relief provided to give effect to a unified doctrine will be considered in Part IV of this Chapter.

of the parties were ascertained and declared by reference to that state of affairs.[53]

The lack of flexibility in common law estoppel is clearly a weakness of the doctrine, and provides a compelling argument for the acceptance of a substantive unified doctrine which provides more flexible relief,[54] or alternatively the extension of the substantive doctrine of equitable estoppel to representations of existing fact. More importantly in the context of this thesis, the preclusionary effect of the common law doctrine means that it does not operate strictly in accordance with its 'basal purpose'[55] of preventing detriment resulting from reliance on the conduct of others. Although the purpose of preventing detriment may be fulfilled, it is fulfilled by the oblique means of making good the assumption of fact adopted by the representee. The effect of the common law doctrine is most consistent with a fundamental concern with the enforcement of promises, since its effect is to fulfil the representee's expectations in every case. The representee's expectation interest is given primacy, while the reliance interest is protected only incidentally.

III. EQUITABLE ESTOPPEL

In giving effect to an equitable estoppel, a court exercises a wide discretion as to the nature of the relief to be granted.[56] The present discussion is concerned with the considerations that guide a court of equity in exercising that discretion. The courts have traditionally been reluctant to articulate those considerations, although a number of judgments in recent years have started to explore them in more detail. In Australia, that trend has culminated in the High Court's articulation in *Verwayen* of a reliance-based approach to the determination of

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[53] Ibid 411 (emphasis added).

[54] This idea is implicit in the advocacy of a unified estoppel by Mason CJ in *Verwayen*, ibid 410-3 and by Lunney, above n 35.

[55] *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674 (Dixon J).

[56] Members of the High Court in *Verwayen* were unanimous in recognising the flexibility of the equitable doctrine in this regard: (1990) 170 CLR 394, 411-2 (Mason CJ), 429 (Brennan J), 439 & 442 (Deane J), 444 (Dawson J), 475 (Toohey J), 487 (Gaudron J), 501 (McHugh J).

relief. The following discussion of equitable estoppel remedies will examine the development of the reliance-based approach to relief, and the way in which it has been implemented since the *Verwayen* decision. The historical section will trace the development of the approach to relief from an original concern with the fulfilment of expectations, to a concern with satisfying equities, then to a concern with 'minimum equities', which ultimately led to the adoption of a reliance-based approach in *Verwayen*. Against that background, an examination of the approach to relief in the post-*Verwayen* cases can be undertaken.

A. *History of the Reliance-Based Approach*

1. The Proprietary Estoppel Cases

The proprietary estoppel cases cause considerable difficulty to anyone attempting to reconcile the various ways in which equitable estoppel remedies have been determined. Proprietary estoppel has a long history and the basis on which relief has been determined has rarely been clearly enunciated. Nevertheless, it is possible to trace the development of the minimum equity principle through the proprietary estoppel cases over the last 100 years. The analysis of those cases below shows that the doctrine of proprietary estoppel was originally concerned with the fulfilment of *expectations*. That was at least partly a result of the confusion discussed in Chapter 1 as to the distinction between the developing doctrine of proprietary estoppel, the enforcement of contractual promises and the making good of representations of fact through estoppel *in pais*. The move towards a concern with fulfilment of *equities*, and towards flexibility in the fulfilment of an equity, began in cases where the representee's assumptions or expectations were uncertain, and so expectation relief could not easily be granted.

It should be noted that the word 'equity' in this context is used to describe the right of a representee to obtain equitable relief against a representor, the

determination of which is within the court's discretion.[57] Marcia Neave and Mark Weinberg have described the equity arising by way of estoppel as an 'undefined equity' on the basis that, where an equitable estoppel arises, the representee cannot assert a right to a particular remedy, but must persuade the court to fashion a remedy on the facts of the particular case.[58] Similarly, in *Pilling v Armitage* the Master of the Rolls regarded facts which would today found a proprietary estoppel as giving rise to a 'general equity', rather than a specific one.[59]

Although proprietary estoppel was described in the early cases as 'an equity' raised by the facts,[60] the concept of satisfying such an equity by means other than expectation relief first arose in cases where there was no clear promise which could be enforced, and it was not clear what interest the representee assumed he or she had or would receive. The concern with satisfying equities was then adopted in cases where the representee's expectations were clear. The focus on the fulfilment of equities led, in turn, to the development of the minimum equity principle, which required the courts to grant a remedy which was the minimum necessary to satisfy the equity raised in favour of the representee.[61]

(a) Expectation-based relief

As two commentators have recently noted, in most of the nineteenth century cases and, indeed, several of the twentieth century cases, the equity raised by proprietary estoppel was simply treated as a basis for enforcing a gratuitous

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[57] Marcia Neave and Mark Weinberg 'The Nature and Function of Equities' (Part 1) (1978) 6 *University of Tasmania Law* Review 24, 24. See also Diane Skapinker 'Equitable interests, mere equities, "personal" equities and "personal equities" - distinctions with a difference' (1994) 68 *Australian Law Journal* 593.

[58] Neave and Weinberg, above n 57, 27.

[59] (1805) 12 Ves Jnr 79; 33 ER 31, 33.

[60] *Pilling v Armitage*, ibid; *The Duke of Beaufort v Patrick* (1853) 17 Beav 60; 51 ER 954, 959.

[61] The shift in the courts' approach from expectations to equities was noted in 1985 by Finn, above n 23, 68, but since he was writing some years before the articulation of a reliance-based approach to relief, he was not able to trace the development of that approach. It is, therefore, worth revisiting the early cases to do so.

promise or fulfilling a relied-upon expectation.[62] The decision of Lord Westbury LC in *Dillwyn v Llewelyn* provides a good example of that approach.[63] The plaintiff's father offered to give the plaintiff a farm so that the plaintiff could build a house on the farm and live near his father. The plaintiff accepted the offer, and the father signed a memorandum 'presenting' the farm to the plaintiff. The plaintiff then took possession of the farm and expended a large sum of money in building a house on it. The land was not conveyed to the plaintiff and, on the father's death, passed under his will to others.

In those circumstances, the Master of the Rolls declared that the plaintiff was entitled to a life-estate in the land. On appeal, the Lord Chancellor held that 'the son's expenditure on the faith of the memorandum supplied a valuable consideration and created a binding obligation' on the father to transfer the fee simple to the son in accordance with the memorandum.[64] The effect of the estoppel was, therefore, to render the promise enforceable. Indeed, Lord Westbury LC suggested that the case was analogous to that of a verbal agreement which became binding by virtue of subsequent part performance.[65] Despite that analogy, the Lord Chancellor held that the extent of the plaintiff's interest in the land depended, not on the terms of the memorandum, but on the acts done by the plaintiff.[66]

Lord Kingsdown adopted a similar approach to relief in his dissenting speech in *Ramsden v Dyson*.[67] He maintained that where a person expends money on the faith of a promised or expected interest in land then 'a Court of equity will

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[62] Finn, ibid 90-1; Patrick Parkinson, 'Equitable Estoppel: Developments after Waltons Stores (Interstate) Ltd v Maher' (1990) 3 *Journal of Contract Law* 50, 60.
[63] (1862) 4 De GF & J 517; 45 ER 1285.
[64] Ibid 1287.
[65] Ibid 1286.
[66] Ibid 1286-7. It should be noted that, having said that the extent of the plaintiff's interest did not depend on the terms of the memorandum, the Lord Chancellor did say that the language of the memorandum was relevant in so far as it 'shews the purpose and intent of the gift'. Lord Westbury held that on its proper construction the memorandum made it clear that the intention of the representor was to vest absolute ownership in the representee, rather than a lesser estate such as a life interest.
[67] (1866) LR 1 HL 129.

compel the landlord to give effect to such promise or expectation.'[68] Lord Cranworth also appeared to regard the doctrine of acquiescence as justifying the granting of relief which fulfils the representee's expectations. He observed that where the owner of land stands by while another person mistakenly improves his or her land, knowing of the mistake, then a court of equity will not allow the owner to assert his or her title to that land.[69]

In *Hamilton v Geraghty*, the Full Court of the Supreme Court of New South Wales applied the *Ramsden v Dyson* doctrine of acquiescence to dismiss a demurrer, and made some observations in passing as to the effect of the doctrine.[70] The plaintiff in that case sought a declaration that the defendant's land was chargeable with the amount the plaintiff expended on it. The expenditure was made under a mistaken belief as to the ownership of the land, while the defendant stood by with knowledge of the mistake. Darley CJ expressed the opinion that the plaintiff was entitled to a declaration that the land belonged to him, which was greater relief than he had sought.[71] Owen J expressed no clear view as to the effect of the doctrine.[72] Interestingly, however, Walker J thought that a reliance-based remedy was more appropriate. He said that the estate created by the expenditure would not necessarily be equal to the whole estate of the person standing by: rather it would 'be co-extensive with the amount of expenditure; that is to say, a charge or lien to that extent.'[73] Although Justice Walker's comments were made by way of *obiter dicta* in a short judgement, they are significant because they provide a rare

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[68] Ibid 170.

[69] Ibid 140-1. Neither the speech of Lord Cranworth LC nor that of Lord Kingsdown supports the distinction drawn by RP Meagher, WMC Gummow and JRF Lehane, *Equity: Doctrines and Remedies* (3rd ed, 1992) 429 between cases of promised gifts of land (such as *Dillwyn v Llewelyn*), which give rise to a right to expectation relief, and cases of mere acquiescence in mistaken improvements, in which the representee is only entitled to a charge or lien over the land in order to 'strip any profit' made by the representor.

[70] (1901) 1 SR (NSW) (Eq) 81.

[71] Ibid 88.

[72] Ibid 88-90.

[73] Ibid 91.

example of an attempt to articulate a principled basis for the determination of relief by which to give effect to proprietary estoppel.[74]

When an expectation-based approach is taken to relief in proprietary estoppel, the operation of the doctrine is closely analogous to the operation of common law estoppel or the enforcement of a contract. Proprietary estoppel resembles common law estoppel when representations as to existing rights are made good, and resembles contract when promises are enforced by the granting of expectation relief. As discussed in Chapter 1, there was clearly confusion in the early cases as to whether the basis of the jurisdiction was contract, estoppel or an equitable doctrine which was separate from both. The preference for expectation relief in the early proprietary estoppel cases may well be attributable to that confusion.

(b) Uncertain expectations

The expectation-based approach applied in the early proprietary estoppel cases caused difficulties in those cases where there was uncertainty as to the nature of the promised or expected interest in the subject land. The court could not simply fulfil a representee's expectations, for example, where the representee had acted on an assumption that the subject land would one day be theirs or that they would be entitled to remain on the land indefinitely. Two quite different approaches have been adopted by the courts to deal with the situation of an uncertain expectation. The first is to grant reliance-based relief; that is, relief which reverses the detriment suffered by the representee in reliance on the relevant promise or representation.[75] The second approach is to grant relief

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[74] The quoted passage of Justice Walker's judgment was applied by the New Zealand Court of Appeal in *Re Whitehead* [1949] NZLR 1066, where precisely the remedy contemplated by Walker J was granted. The representee in *Re Whitehead* had incurred expenditure in constructing a cottage on his father's land on the assumption, encouraged by his father, that the land was his. The representee was held to have acquired a lien or charge over the land to the extent of his expenditure.

[75] A similar approach was articulated by the Privy Council in *Chalmers v Pardoe* [1963] 1 WLR 677, 681-2. The Judicial Committee said in *obiter dicta* that where the owner of land has encouraged expenditure on the faith of an assurance or promise that part of the land would be made over to the person expending the money, a court of equity will *prima facie* require the owner to make a conveyance of that land. Where such a conveyance cannot be made, for

which, in the court's view, best accommodates the representee's uncertain expectations or, in other words, best satisfies the equity arising in favour of the representee.

(i) Reliance-based relief

In *Ramsden v Dyson*, Lord Kingsdown contemplated the granting of a reliance-based remedy in situations where the promised or expected interest was uncertain.[76] Although he stated the general rule of proprietary estoppel in terms of the court fulfilling the relevant promise or expectation,[77] Lord Kingsdown went on to say that if there is uncertainty as to the particular terms of the contract, then a court of equity would grant relief 'either in the form of a specific interest in the land, or in the shape of compensation for the expenditure'.[78] He did not explain why the personal remedy of compensation for expenditure should be granted in some cases, while the proprietary, and potentially more extensive, remedy of a specific interest should be granted in others.

A reliance-based remedy was granted by Sir John Romilly MR to give effect to a proprietary estoppel in *The Unity Joint Stock Mutual Banking Association v King*.[79] Mr King allowed his sons to erect certain buildings on land that he intended to transfer to them at some time in the future. On that basis, the Master of the Rolls held that the father could not have retaken possession of the land 'without allowing to his sons the amount of money they had laid out on it', and he therefore held that 'the money laid out by the sons was a lien and charge upon it, as against the father.'[80] The effect of granting the lien was to reverse the detriment the sons had suffered in reliance on the assumption that they would be granted a proprietary interest in the land in the future. The Master of

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reasons of title for example, then the court may declare the person expending the money entitled to an equitable charge or lien for the amount so expended.

[76] (1866) LR 1 HL 129, 171.

[77] Ibid 170.

[78] Ibid 171.

[79] (1858) 25 Beav 72; 53 ER 563 ('*Unity Bank v King*').

[80] Ibid 565.

the Rolls did not indicate why he granted a reliance-based remedy, but there was uncertainty as to the nature of the expectation: it was not clear what interest would be granted to the sons, or when it would be granted to them.

That decision was relied upon by Cox J of the South Australian Supreme Court in a dissenting judgment in *Jackson v Crosby (No 2)*.[81] The respondent in that case built a house on land owned by the appellant in the expectation that they would be married and the respondent would live with the appellant in the house. When the relationship broke down, the respondent was held to be entitled to relief on the basis of proprietary estoppel. The trial judge found the terms of the agreement between the parties to be sufficiently certain that it could be concluded that the respondent was to receive a half interest in the property, and accordingly he was held to be entitled to such an interest. At his request the respondent was granted damages in lieu of such proprietary relief.[82] On appeal, that determination of relief was upheld by a majority of the Full Court.[83]

The third member of the Full Court, Cox J, considered that the case was not one of the *Dillwyn v Llewelyn* kind, where there was a complete agreement between the parties, and so that form of remedy was inappropriate.[84] Since there was no agreement as to the basis upon which a joint interest in the property would be transferred to the respondent, the proper order was 'a declaration or award in favour of the respondent reflecting the respondent's expenditure of labour and skill upon the house'.[85] Cox J said that in a suitable case relief could be assessed as compensation for the value of the work done by the representee.[86]

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[81] (1979) 21 SASR 280.
[82] Ibid 288 (Bright J).
[83] Ibid 302 (Zelling J), 310 (Mohr J).
[84] Ibid 307.
[85] Ibid.
[86] Ibid, citing *Unity Bank v King* as an example of a case in which such relief had been granted.

The approach of Cox J seemed to be that expectancy relief was only to be granted where there was a complete agreement between the parties. Where there was a clear agreement that a particular interest would be transferred to the representee then, as in *Dillwyn v Llewelyn*, the appropriate relief was to order the representor to transfer that interest to the representee. Where there was no clear agreement and, therefore, no clear expectation which could be fulfilled, the court should grant reliance-based relief by way of compensation or a lien for the value of work done by the representee.[87]

(ii) Satisfying the equity

A lack of certainty in the representee's expectation did not, however, lead the Privy Council to grant a reliance-based remedy in *Plimmer v Wellington Corporation*.[88] The appellants in *Plimmer* had incurred considerable expenditure on improvements to crown land, in circumstances creating a reasonable expectation that their occupation would not be disturbed. They could not, however, point to any specific promise or expectation of an interest in the land. Sir Arthur Hobhouse, giving judgment on behalf of the Privy Council, observed that there had been a difference of opinion amongst great judges as to the nature of the relief to be granted in such cases, but there was no doubt that relief would be granted, 'either in the form of a specific interest in the land, or in the shape of compensation for the expenditure'.[89] The Privy Council held that 'the court must look at the circumstances in each case to decide in what way the equity can be satisfied.'[90] Their Lordships explained the remedies granted in *The Duke of Beaufort v Patrick*,[91] *Dillwyn v Llewelyn* and *Unity Bank v King*, on the basis that, in each case, the remedy granted

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[87] It should be noted that reliance-based relief has also been granted in cases where the expectancy could not be fulfilled for reasons of title or because of supervening events: Meagher, Gummow and Lehane, above n 68, 428. See also *Chalmers v Pardoe* [1963] 1 WLR 677, 681-2, discussed above n 75. An example is provided by *Morris v Morris* [1982] 1 NSWLR 61, where the representee was granted an equitable charge over the subject property in circumstances where his expectation of an indefinite right of residence in the property could not be fulfilled because of a breakdown in the relationship between the parties.

[88] (1884) 9 App Cas 699 (*'Plimmer'*).

[89] Ibid 710-1.

[90] Ibid 714.

satisfied the equity raised.[92] The Privy Council did not explain, however, how the equity differed from case to case or how the circumstances of each case helped to determine the most appropriate way in which to satisfy the equity. In *Plimmer* itself, the equity was satisfied by granting to the appellants a perpetual licence to use the subject property.

The *Plimmer* approach has been followed in a number of cases in which representees' expectations have been uncertain.[93] The approach also came to be applied in cases where the expectations were clear, such as *ER Ives Investments Ltd v High*,[94] where the English Court of Appeal found that fulfilment of the defendant's expectations, by the grant of a perpetual right of access, was the only way in which the equity could be satisfied. The decision in *Plimmer* can, therefore, be seen as an important staging post in the development of the minimum equity principle. Although the judgment did not provide any framework for determining relief, it did recognise the fact that the court was faced with alternatives in the granting of relief, and was afforded a wide discretion in satisfying the equity in each case.

2. Development of the Minimum Equity Approach

Prior to the decision of the English Court of Appeal in *Crabb v Arun District Council*,[95] the court's purpose in determining relief, following *Plimmer* and *Inwards v Baker*, was simply to fashion a remedy to fit the circumstances of each case. In most cases, that simply meant granting the interest the representee expected to receive. In *Crabb v Arun District Council*, Scarman LJ introduced the concept of the 'minimum equity'. Scarman LJ observed that it was well settled law that:

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[91] (1853) 17 Beav 60; 51 ER 954.
[92] (1884) 9 App Cas 699, 713-4.
[93] Notably *Inwards v Baker* [1965] 2 QB 29; *Holiday Inns v Broadhead* (1974) 232 EG 951; *Riches v Hogben* (1986) 1 Qd R 315, 327 (Macrossan J); *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582, 604-16 (Priestley JA, dissenting).
[94] [1967] 2 QB 379.
[95] [1976] 1 Ch 179.

> the court, having analysed and assessed the conduct and relationship of the parties, has to answer three questions. First, is there an equity established? Secondly, what is the extent of the equity, if one is established? And, thirdly, what is the relief appropriate to satisfy the equity?[96]

Having established that an equity arose in favour of the plaintiff in the circumstances, Scarman LJ said that he 'would analyse the *minimum equity* to do justice to the plaintiff as a right either to an easement or to a licence upon terms to be agreed'.[97] The reference to the 'minimum equity' could be construed as a reference to the minimum relief necessary to prevent the representee suffering detriment as a result of his or her reliance,[98] or as the minimum relief necessary to fulfil the representee's expectations (such as declaring the representee to be entitled to a right of way over the representee's land, rather than a conveyance of the fee simple).[99]

The concept of a 'minimum equity' approach to relief was taken up by the Court of Appeal in *Pascoe v Turner*.[100] The case was concerned with a dwelling house owned by the plaintiff. The defendant lived with the plaintiff in his house for several years until the plaintiff terminated the relationship and went to live elsewhere. The defendant continued to live in the house, was later told by the plaintiff that the house and its contents were hers, and subsequently expended a sum of money on repairs, improvements and redecorations to the house. Having established that, on those facts, an equity arose in favour of the defendant, the Court of Appeal discussed the question whether the equity should be satisfied by granting a licence to the defendant to occupy the house

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[96] Ibid 192-3.

[97] Ibid 198 (emphasis added).

[98] The expression was construed in this way in 1982 by JD Heydon, WMC Gummow and RP Austin, *Cases and Materials on Equity and Trusts* (2nd ed, 1982) 307 and subsequently by Brennan J in *Waltons Stores* (1988) 164 CLR 387, 423-7 and Priestley JA in *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466, 472.

[99] It should be noted that, on the facts of *Crabb*, the detriment suffered by the representee as a result of his reliance on the representation probably exceeded the value of the expectation, justifying the grant of expectation relief even on a reliance-based approach: JD Heydon and PL Loughlan, *Cases and Materials on Equity and Trusts* (5th ed, 1997) 398.

for her lifetime, or whether there should be a transfer to her of the fee simple. Ultimately, the court determined that the only way to give effect to the defendant's equity was 'by compelling the plaintiff to give effect to his promise and her expectations' by conveying the fee simple to her.[101]

Since *Pascoe v Turner*, the English courts have not attempted to define the minimum equity concept any further. Although one English commentator has suggested that '[t]he doctrine of proprietary estoppel is traditionally understood to give rise to a reliance-based remedy, rather than an expectation based one',[102] the minimum equity concept has not been interpreted in that way in the English courts.[103] Indeed, it seems the minimum equity concept itself is not uniformly applied by the English courts in the determination of equitable estoppel remedies. In *Wayling v Jones*,[104] the Court of Appeal granted expectation relief to give effect to proprietary estoppel, without raising any question of what was the equity or minimum equity raised by the representor's

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[100] [1979] 2 All ER 945.

[101] Ibid 951 (Cumming-Bruce LJ, giving judgment for the Court of Appeal).

[102] Christine Davis, 'Estoppel—Reliance and Remedy' [1995] *The Conveyancer and Property Lawyer* 409, 415. A similar claim has been made by PS Atiyah, 'Contracts, Promises, and the Law of Obligations' in *Essays on Contract* (1986) 10, 55-6. RD Oughten, 'Proprietary Estoppel: A Principled Remedy' (1979) 129 *New Law Journal* 1193, on the other hand, has argued that relief in the English cases should be based on protecting the representee's reliance interest, but often is not. He criticises decisions such as *Pascoe v Turner* in which expectations have been fulfilled despite minimal reliance.

[103] Roger Smith, 'How Proprietary is Proprietary Estoppel?' in FD Rose (ed), *Consensus Ad Idem* (1996) 235, 240 in fact argues that the objective pursued by the English courts in proprietary estoppel cases is fulfilment of the expectation, and 'we can predict that expectations will, in a normal case, be recognised as the most appropriate remedy.' It is interesting to note, however, that in *Sledmore v Dalby* (1996) 72 P & CR 196, 208, 208, Hobhouse LJ applied Chief Justice Mason's statement in *Commonwealth v Verwayen* (1990) 170 CLR 394, 413 that there must be proportionality between the remedy and the detriment. Hobhouse LJ interpreted this to mean 'little more than that the end result must be a just one having regard to the assumption made by the party asserting the estoppel and the detriment which he has experienced': (1996) 72 P & CR 196, 208, 209. This indication that a principled, reliance-based approach to relief may be adopted in England has been welcomed by at least one English commentator: Mark Pawlowski, 'Proprietary Estoppel—Satisfying the Equity' (1997) 113 *Law Quarterly Review* 232, 236-7.

[104] (1995) 69 P & CR 170. The representee in *Wayling v Jones* cohabited with the representor. The representee acted as the representor's chauffeur for many years in return for only pocket money and living expenses, on the faith of the representor's promise that the representee would inherit a hotel owned by the representor. The hotel owned by the representor at the time of his death was not left to the representee. The Court of Appeal held that a proprietary estoppel arose in favour of the representee, which entitled him to the net sale proceeds of the hotel.

conduct.[105] In *Baker v Baker*,[106] on the other hand, all three members of the Court of Appeal referred with apparent approval to Lord Justice Scarman's minimum equity principle, but did not see it as requiring the court to grant reliance-based relief.

B. *Promissory Estoppel*

From it origins in the famous statement of Lord Cairns LC in *Hughes v Metropolitan Railway Company*, promissory estoppel also had a preclusionary operation.[107] It prevented a person from enforcing contractual rights which a second person had been led to believe would not be enforced.[108] Lord Cairns' statement assumed that the equitable principle operated in much the same way as common law estoppel, by holding a person to the supposition they had caused another person to adopt. In other words, the effect of the estoppel (as it later came to be known) was that, to the extent that the representee expected that the representor would not enforce certain rights, the representee's expectations would be fulfilled.

When the decision of the House of Lords in *Hughes* was followed by the Court of Appeal in *Birmingham & District Land Company v London & North*

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[105] It should be noted, however, that the representee in *Wayling v Jones* had relied on the relevant assumption for a considerable period and suffered substantial and irreversible detriment as a result. Fulfilment of the representee's expectations can be justified in such circumstances, even if one adopts a strict reliance-based approach to relief: see *Verwayen* (1990) 170 CLR 394, 416 (Mason CJ).

[106] (1993) 25 HLR 408, 412 (Dillon LJ), 415 (Beldam LJ), 418 (Roch LJ). The plaintiff in *Baker v Baker* gave up his rented accommodation and contributed £33,950 towards the purchase by the defendants (his son and daughter in law) of a house, in the expectation that he would have a right to reside in a room in the house rent-free for the rest of his life. When the relationship between the parties broke down, the plaintiff was held to be entitled to compensation equal to the value of the promised rent-free accommodation.

[107] (1877) 2 App Cas 439 ('*Hughes*').

[108] Ibid 448 (emphasis added):

> [I]t is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results - certain penalties or legal forfeiture - afterwards by their own act or with their own consent enter upon a course of negotiations which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, *the person who otherwise might have enforced those rights will not be allowed to enforce them* where it would be inequitable having regard to the dealings which have thus taken place between the parties.

Western Railway Company,[109] it again had the effect that the representor was prevented from departing from the relevant assumption. Bowen LJ stated the relevant principle in broader terms than Lord Cairns, and with a slightly different approach to relief: a person who had led another to believe that certain contractual rights would not be enforced for a particular time could not enforce them until that time had elapsed, 'without at all events placing the parties in the same position as they were before.'[110] Lord Justice Bowen's reference to 'placing the parties in the same position as they were before' seems to point to an obligation on the part of the representor to make good any detriment suffered as a result of the induced belief. It is not clear, however, whether his Lordship intended that a court would grant relief having that effect, or whether he simply intended that a representor could avoid an estoppel arising by taking steps which had that effect.[111]

When the doctrine of promissory estoppel was 'established, or revived'[112] by Denning J in *Central London Property Trust Ltd v High Trees House Ltd,*[113] the principle he enunciated operated by holding parties to the promises they had made that certain rights would not be enforced. Once the estoppel was raised, the court was to give effect to it by means of expectation relief, without reference to the detriment suffered by the promisee as a result of reliance on the promise. His Lordship held that 'a promise intended to be binding, intended to be acted upon and in fact acted upon, is binding so far as its terms properly apply'.[114] That doctrine, of course, had a limited operation: it only applied to a promise not to enforce existing legal rights, and did not 'go so far as to give a cause of action in damages for breach of such a promise', but operated

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[109] (1888) 40 Ch D 268.
[110] Ibid 286 (emphasis added).
[111] The latter approach was applied by Drummond J in *Re Neal; ex parte Neal v Duncan Properties Pty Ltd* (1993) 114 ALR 659, discussed below, text accompanying nn 203-205.
[112] NC Seddon and MP Ellinghaus, *Cheshire and Fifoot's Law of Contract* (7th Aust ed, 1997) 58.
[113] [1947] 1 KB 130.
[114] Ibid 136.

defensively to prevent the party making the promise from acting inconsistently with it.[115]

In *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd*,[116] the House of Lords qualified the principle of promissory estoppel, emphasising the fact that its effect is not to extinguish rights, but only to suspend them. Thus, the representor can revert to his or her original position by giving reasonable notice to the representee of the representor's intention to enforce his or her strict rights. Reasonable notice means sufficient notice to allow the representee to resume his or her original position, and the representor's rights will be extinguished only if the representee cannot resume his or her original position.[117] Although Lord Denning subsequently indicated that the effect of promissory estoppel was permanent,[118] it is now well accepted that the effect of promissory estoppel is suspensory in all cases other than those in which the representee cannot resume his or her original position.[119]

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[115] Ibid 134.

[116] [1955] 2 All ER 657.

[117] *Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 3 All ER 556, 559 (PC). An example is provided by *Ogilvy v Hope-Davies* [1976] 1 All ER 683, where the vendor of land indicated two weeks prior to the agreed completion date that he would not insist on completion on that date. Graham J held, ibid 689, that there was no question of reinstating the completion date 'because the time was far too short.'

[118] *D & C Builders Ltd v Rees* [1965] 3 All ER 837, 841.

[119] The view was reiterated by the House of Lords in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India Ltd* [1990] 1 Lloyd's Rep 391, 399, and is supported by leading commentators: George Spencer Bower and Sir Alexander Turner, *The Law Relating to Estoppel by Representation* (1977) 395-400; GH Treitel, *The Law of Contract* (9th ed, 1995) 106-7. Under the reliance-based approach to equitable estoppel adopted in Australia, the question of suspensory effect is subsumed by the focus on the detriment suffered by the representee. As discussed in Chapter 4, an estoppel will only arise in Australia where the representee will suffer detriment as a result of his or her reliance, if the representor is allowed to resile from the assumption induced by his or her conduct. As discussed below, the effect of an equitable estoppel in Australia is to raise an equity in favour of the representee, which the court must satisfy by granting relief designed to prevent or reverse any detriment resulting from reliance on the relevant assumption. Thus, where no detriment will be suffered by the representee if the representor reasserts his or her rights at a future date, the representor is free to do so, and no estoppel will arise. In a case where the representee has acted on the relevant assumption, the representor may effectively give notice to the representee of the representor's intention to reassert his or her rights, and will be liable to ensure only that the representee does not suffer detriment as a result of past acts of reliance. See *Forbes v Australian Yachting Federation Inc* (1996) 131 FLR 241, 289.

That preclusionary approach to promissory estoppel was adopted and applied by the South Australian Supreme Court in *Je Maintiendrai Pty Ltd v Quaglia.*[120] Having determined that the respondent tenant had acted to his detriment in reliance on the appellant landlord's representation that a reduced rent would be accepted, a majority of the court held that the landlord was 'estopped from claiming' the difference.[121] The doctrine applied in *Je Maintiendrai* had an operation similar to that of common law estoppel when it is applied in relation to rights, rather than existing facts. There was no reference in the judgments to any flexibility available to the court in satisfying the equity. The effect of the estoppel was simply to prevent the promisor from acting inconsistently with the relevant promise.

The doctrine of promissory estoppel which Gibbs CJ and Murphy J would have upheld in their dissenting judgment in *Legione v Hateley* had a similar preclusionary operation, preventing the representors from asserting rights which they had represented would not be exercised.[122] It will be recalled that the purchasers in that case acted to their detriment, by failing to tender the purchase price within the time specified in the vendors' notice of rescission, on the faith of a representation made on behalf of the vendors that an extension of time would be granted. Gibbs CJ and Murphy J held that '[t]he vendors were estopped from treating the contract as rescinded', and would have granted specific performance to the purchasers.[123]

C. *Equitable Estoppel*

Having considered the approach to relief in the early proprietary estoppel cases and the early promissory estoppel cases, the next step is to consider the approach taken to relief in those cases decided after the two doctrines were recognised as emanations of a unified equitable estoppel. As Mason CJ and

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[120] (1980) 26 SASR 101 ('*Je Maintiendrai*').
[121] Ibid 116 (White J).
[122] (1983) 152 CLR 406. Mason and Deane JJ described the operation of the doctrine in similar terms, ibid 432.
[123] Ibid 423.

Wilson J noted in *Waltons Stores*, the Court of Appeal in *Crabb v Arun District Council* 'treated promissory estoppel and proprietary estoppel ... as mere facets of the same general principle'.[124] That notion of a generic equitable estoppel appeared to be accepted by the House of Lords in its recent decision in *Roebuck v Mungovin.*[125] In Australia, it was the High Court's judgment in *Waltons Stores* which recognised the existence of a unified doctrine of equitable estoppel encompassing both proprietary estoppel and promissory estoppel.[126]

A consequence of the recognition of a unity of principle between promissory and proprietary estoppels was that the flexible 'equities' based approach to relief in the proprietary estoppel cases came to be applied in the promissory estoppel cases. Although promissory estoppel had previously had a purely preclusionary operation in Australia, the 'minimum equity' approach, which emerged from the judgment of Scarman LJ in *Crabb v Arun District Council,* was held in *Waltons Stores* to be applicable to all types of equitable estoppel. The adoption of the minimum equity principle in *Waltons Stores* and its refinement in *Verwayen* will be examined below.

Although the minimum equity principle has been interpreted by the Australian courts as requiring a reliance-based approach to remedy in equitable estoppel, the English courts do not seem to have moved beyond the flexible 'minimum equity' approach adopted by the Court of Appeal in *Pascoe v Turner.* Finn observed in 1985 that, although it became the court's function to divine the 'minimum equity to do justice to the plaintiff', the judgments in *Crabb v Arun District Council* and *Pascoe v Turner* left unexplained the precise signification of the word 'minimum'.[127] Since *Pascoe v Turner,* however, the English courts have not treated the minimum equity concept as anything more than a guiding principle in the exercise of the court's discretion and, indeed, have often

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[124] (1988) 164 CLR 387, 403.
[125] [1994] 2 AC 224.
[126] *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466, 472 (Priestley JA).
[127] Finn, above n 23, 91.

ignored it.[128] In its recent decision in *Roebuck v Mungovin*, the House of Lords held that '[i]f an equitable estoppel is raised the court's function is to determine what, if anything, is necessary to satisfy the equity in all the circumstances of the case.'[129] Their Lordships did not refer to the 'minimum equity' concept and did not articulate the basis on which the court might determine what was necessary to satisfy the equity in a particular case.

1. The Approaches to Relief in *Waltons Stores*

Although the approach articulated by Scarman LJ in *Crabb v Arun District Council* was adopted by four members of the High Court in *Waltons Stores*,[130] only Brennan J took the opportunity of exploring in detail the nature of the 'minimum equity' identified by Scarman LJ. In fact, an examination of the judgments shows that very little consideration was given to identifying the minimum equity necessary to do justice to the representee in that case, presumably because that was not an issue argued before the court. It will be recalled that a majority of the High Court decided the case on the basis of equitable estoppel, having found that the relevant assumption adopted by the Mahers was that Waltons *would* enter into an agreement of lease.[131] The effect of the equitable estoppel that arose in *Waltons Stores* was essentially preclusionary: the estoppel effectively prevented Waltons from denying the existence of contractual rights which the Mahers were induced to believe they would have.[132]

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[128] See, for example, *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1983] QB 133 (Oliver J); *Re Basham* [1986] 1 WLR 1498 (Edward Nugee QC) and *Wayling v Jones* (1995) 69 P & CR 170 (Court of Appeal).

[129] [1994] 2 AC 224, 235.

[130] (1988) 164 CLR 387, 404 (Mason CJ and Wilson J), 425 (Brennan J), 460 (Gaudron J).

[131] Ibid 397-8 (Mason CJ and Wilson J), 417-8 (Brennan J); cf 439-40 (Deane J) and 458-60 (Gaudron J), who held that the relevant assumption was that a binding agreement *had* been made.

[132] (1988) 164 CLR 387, 408 (Mason CJ and Wilson J); cf 431-3 (Brennan J). The facts of the case were discussed in Chapter 3 above.

Although Mason CJ and Wilson J cited with approval Lord Justice Scarman's 'minimum equity' approach to relief,[133] they did not discuss how best to satisfy the equity arising in favour of the Mahers. They simply held that Waltons was 'estopped in all the circumstances from retreating from its implied promise to complete the contract.'[134] In accordance with his interpretation of the facts, Deane J found that the estoppel which arose against Waltons precluded Waltons from 'denying the existence of a binding contract' and provided 'the factual foundations for an ordinary action for enforcement of that "contract".'[135] Similarly, Gaudron J found that Waltons was estopped from denying that exchange had taken place and, accordingly, the rights and liabilities of the parties were to be determined on the basis that it had in fact taken place.[136]

Brennan J gave detailed consideration in his judgment to the object to be pursued by a court in giving effect to an equitable estoppel. Justice Brennan's refinement of the concept of a 'minimum equity' marks a turning point in the development of equitable estoppel because he articulated, for the first time, a clearly reliance-based approach to the determination of relief. The equity created by estoppel is, he suggested, to be satisfied by the party estopped:

> doing or abstaining from doing something in order to prevent detriment to the party raising the estoppel which that party would otherwise suffer by having acted or abstained from acting in reliance on the assumption or expectation which he has been induced to adopt.[137]

Central to Justice Brennan's approach to relief was the notion that equitable estoppel operates as a source of legal obligation, rather than operating, like common law estoppel, as a means of establishing a state of affairs by reference

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[133] Ibid 404.
[134] Ibid 408.
[135] Ibid 445.
[136] Ibid 464.
[137] Ibid 416.

to which the legal relationship between the parties is to be established.[138] On that basis, the object of equitable estoppel is to prevent the detriment flowing from reliance on promises, rather than to enforce those promises,[139] and relief is determined accordingly.[140]

Applying those principles to the facts, Brennan J found that an equity was raised against Waltons, which was to be satisfied by treating Waltons 'as though it had done what it induced Mr Maher to expect that it would do, namely by treating Waltons as though it had executed and delivered the original lease.'[141] Brennan J went on to say that:

> It would not be appropriate to order specific performance if only for the reason that the detriment can be avoided by compensation. The equity is fully satisfied by ordering damages in lieu of specific performance.[142]

It is clear that the Mahers' equity was fully satisfied by granting damages in lieu of specific performance, but one must ask whether an award of expectation damages[143] represented the minimum equity.[144] Brennan J himself said that 'the equity is to be satisfied by avoiding a detriment suffered in reliance on an induced assumption.'[145] The relevant detriment suffered by the Mahers was the wasted expenditure in demolishing the existing building and constructing the building required by Waltons, along with any diminution in the value of the land as a result of the demolition. It is possible that an award of compensation (representing the cost of the demolition and building works, and any

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[138] Ibid. Cf *Verwayen* (1990) 170 CLR 394, 439 & 443 (Deane J).
[139] (1988) 164 CLR 387, 426.
[140] Ibid 427.
[141] Ibid 430.
[142] Ibid.
[143] Damages awarded in lieu of specific performance under Lord Cairns' Act provisions must be calculated on an expectation basis since they are required to 'constitute a true substitute for specific performance': *Wroth v Tyler* [1974] Ch 30, 58 (Megarry J). See also *Johnson v Agnew* [1980] AC 367, 400 (Lord Wilberforce) and the discussion of equitable damages as an estoppel remedy below.
[144] John Carter, 'Contract, Restitution and Promissory Estoppel' (1989) 12 *University of New South Wales Law Journal* 30, 57, has also questioned the granting of an expectation based remedy in *Waltons Stores* given that, 'for the majority, there was no contract by estoppel.'
[145] (1988) 164 CLR 387, 433.

diminution in the value of the land) may have represented the minimum equity, but evidence of the quantum of the Mahers' loss does not appear to have been before the court.[146]

2. The Approaches to Relief in *Verwayen*

(a) The relief granted

The reliance-based approach to relief articulated by Brennan J in *Waltons Stores* came more clearly to represent the law in Australia when it was taken up by five members of the High Court in *Verwayen*.[147] If the judgments in *Waltons Stores* were notable for the lack of attention given to relief, the judgments in *Verwayen* were characterised by a focus on the nature of the relief to be granted. Although five members of the High Court supported a reliance-based approach to determining relief in cases of equitable estoppel,[148] the remedy granted to Mr Verwayen did have the effect of fulfilling his expectation that the Commonwealth would not take advantage of the relevant defences. Toohey and Gaudron JJ based their decisions on waiver, rather than estoppel, holding that

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[146] As LJ Priestley, 'Estoppel: Liability and Remedy?' in Donovan Waters (ed), *Equity, Fiduciaries and Trusts* (1993) 273, 293, has suggested, the granting of expectation relief in *Waltons Stores* may be explicable on the basis that the nature of the relief to be granted was not argued before the court.

[147] Although in *Waltons Stores* only Brennan J had construed the minimum equity principle in such a way as to require relief to be determined according to a reliance-based approach, Priestley JA in *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466, 472 took that approach to represent the law. Since *Verwayen*, many judges have regarded the reliance-based approach as representing the law, and have felt obliged to determine relief in accordance with that approach: *Burnside Sub-Branch RSSILA Inc v Burnside Memorial Bowling Club Inc* (1990) 58 SASR 324, 346 (FC); *Lorimer v State Bank of New South Wales*, (New South Wales Court of Appeal; Kirby P, Priestley and Handley JJA, 5 July 1991) (Kirby P); *Re Neal; ex Parte Neal v Duncan Properties Pty Ltd* (1993) 114 ALR 659, 669 (Drummond J); *DTR Securities Pty Ltd v Sutherland Shire Council* (1993) 79 LGERA 88, 98 (Talbot J); *Commonwealth v Clark* [1994] 2 VR 333, 383 (Ormiston J); *Blazely v Whiley* (1995) 5 Tas R 254, 276-7 (Wright J); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1995) 8 ANZ Ins Cas 61-232, 75,594 (Powell JA); *Sunpost Pty Ltd v Alsons Pty Ltd* [1995] ANZ Conv R 575, 578 (Bryson J); *Forbes v Australian Yachting Federation Inc* (1996) 131 FLR 241, 286-9 (Santow J); *Woodson (Sales) Pty Ltd v Woodson (Aust) Pty Ltd* (1997) 7 BPR 14,685, 14,721 (Santow J); *The Public Trustee, as Administrator of the Estate of Williams (dec'd) v Wadley* (Full Court of the Supreme Court of Tasmania, Wright, Crawford and Zeeman JJ, 27 June 1997), Crawford and Zeeman JJ; but cf *Commonwealth v Clark* [1994] 2 VR 333, 342-3 (Marks J); *Giumelli v Giumelli* (1996) 17 WAR 17, 166 (Rowland J) who felt free to adopt different approaches.

[148] (1990) 170 CLR 394, 415-7 (Mason CJ), 429-30 (Brennan J), 454 (Dawson J), 475 (Toohey J) and 500-1 (McHugh J). The facts of the case were discussed in Chapter 3.

the Commonwealth had irrevocably waived its right to take advantage of the relevant defences.[149] The other members of the majority, Deane and Dawson JJ, granted Mr Verwayen expectation-based relief on the basis of estoppel.

Deane J adopted an expectation-based approach to giving effect to estoppel, although it is notable that he was applying a unified doctrine of estoppel by conduct, which operates both at law and in equity:

> Prima facie, the operation of an estoppel by conduct is to preclude departure from the assumed state of affairs. It is only where relief framed on the basis of that assumed state of affairs would be inequitably harsh, that some lesser form of relief should be awarded.[150]

Deane J found that Mr Verwayen had suffered detriment consisting of stress, anxiety and ill health which would be rendered futile if the Commonwealth were allowed to depart from its assumption.[151] The relevant detriment would extend far beyond any question of legal costs and was of such a nature and extent that it was not unjust to hold the Commonwealth 'to the assumed state of affairs on the basis of which it induced Mr Verwayen to act.'[152] While Dawson J approved the reliance-based approach to relief articulated by Brennan J in *Waltons Stores*,[153] he found that Mr Verwayen had suffered substantial detriment as a result of his reliance on the relevant assumption, which could not be measured in terms of money.[154] Accordingly, the equity raised by the Commonwealth's conduct could only be accounted for by fulfilment of Verwayen's assumption. The Commonwealth was thus 'estopped from insisting upon the statute of limitations'.[155]

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[149] Ibid 475 (Toohey J) and 487 (Gaudron J).
[150] Ibid 443. Although in the passage extracted Deane J was describing the operation of a unified estoppel, it is clear that he considered that equitable principle also entitled a party to relief framed on that basis: ibid 439.
[151] Ibid 448.
[152] Ibid 449.
[153] Ibid 454.
[154] Ibid 461-2.

Of the three dissentients, Brennan J found that an equitable estoppel did arise, but would have ordered an inquiry into Verwayen's out of pocket costs in order to determine what relief was appropriate.[156] Mason CJ and McHugh J held that there was no evidence of any non-financial loss. Since an order for costs would have been sufficient recompense for the detriment suffered by Verwayen, any estoppel which arose did not prevent the Commonwealth from pleading the relevant defences.[157] McHugh J observed that, had Verwayen established that he had suffered additional worry and stress as a result of his reliance on the Commonwealth's assurances, his equity would have been satisfied by an award of compensation.[158]

(b) Support for a reliance-based approach to relief

Although the Court was divided on the question whether Verwayen had established that he had suffered material detriment on the faith of the assumption which the Commonwealth's conduct induced him to adopt, there was clear majority support for a reliance-based approach to relief. Although Mason CJ was referring to a doctrine of estoppel which operates at common law as well as in equity, the Chief Justice held that the court:

> may do what is required, but no more, to prevent a person who has relied upon an assumption as to a present, past or future state of affairs ... which assumption the other party has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness. A central element of that doctrine is that there must be proportionality between the remedy and the detriment which is its purpose to avoid.[159]

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[155] Ibid 462.
[156] Ibid 430.
[157] Ibid 416-7 (Mason CJ) and 504 (McHugh J).
[158] Ibid 504.
[159] Ibid 413.

Brennan J affirmed and applied the reliance-based approach he articulated in *Waltons Stores*, finding that 'to hold the Commonwealth to its promise to admit liability in negligence would be to go beyond the minimum equity' needed to avoid the relevant detriment.[160] Dawson J quoted with apparent approval a statement from the judgment of Brennan J in *Waltons Stores* that the equity raised by estoppel is to avoid the detriment suffered as a result of reliance, rather than to entitle the party to the full benefit of the assumption which he or she relied upon.[161] Although Justice Toohey's remarks on estoppel were purely by way of *obiter dicta*, his Honour's interpretation was that 'on the present state of the authorities, the consequence of any promissory estoppel is that the court should enforce the promise only as a means of avoiding the relevant detriment and to the extent necessary to achieve that end'.[162] Finally, McHugh J approved the statement of Priestley JA in *Silovi Pty Ltd v Barbaro*[163] that '[t]he remedy granted to satisfy the equity ... will be what is necessary to prevent detriment resulting from unconscionable conduct.'[164]

Two members of the Court, Deane and Gaudron JJ, favoured an expectation-based approach to relief, holding that the representee has a *prima facie* right to have his or her expectations made good. According to Deane J, the relevant assumption should be made good unless to do so would 'exceed what could be justified by the requirements of good conscience and would be unjust to the estopped party.'[165] Just as Justice Brennan's reliance-based approach to relief flowed from his belief that estoppel operates as a source of legal obligation, Justice Deane's expectation-based approach stemmed from his view of estoppel by conduct as an evidentiary principle, rather than a substantive doctrine. As discussed in Chapter 1, Justice Deane's view is that estoppel by conduct 'does not of itself constitute an independent cause of action', but simply operates 'to fashion an assumed state of affairs' which may be relied upon defensively or

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[160] Ibid 430.
[161] Ibid 454.
[162] Ibid 475.
[163] (1988) 13 NSWLR 466, 472.
[164] (1990) 170 CLR 394, 501.
[165] Ibid 445-6.

aggressively 'as the factual foundation of an action arising under ordinary principles with the entitlement to ultimate relief being determined on the basis of the existence of that fact or state of affairs.'[166]

Gaudron J, on the other hand, was somewhat more concerned with reliance, suggesting that 'it may be that an assumption should be made good unless it is clear that no detriment will be suffered other than that which can be compensated by some other remedy.'[167] Two different expectation-based approaches, therefore, emerged from *Verwayen*. On the approach of Deane J, the representee's assumption should be made good unless that would cause injustice to the representor and, on the approach of Gaudron J, the representee's assumption should be made good unless it is clear that some other remedy will be effective to prevent detriment being suffered. Under both approaches the representee has a *prima facie* right to expectation relief; the approaches differ only as to the circumstances in which that *prima facie* right would be displaced.

(c) Granting expectation relief

Five of the seven members of the High Court in *Verwayen*, though, favoured a reliance-based approach to the determination of relief in equitable estoppel. In applying that approach, a court should seek to provide relief which protects the representee's reliance interest. That is, relief which prevents or reverses the detriment which would be suffered by the representee, as a result of action taken by the representee in reliance on the relevant assumption, if the representor were allowed to depart from that assumption.[168] As noted above, many judges in subsequent cases have regarded this approach as representing the law in Australia.[169] The question which must therefore be addressed is when, in accordance with that approach, a court should grant relief which has the effect of fulfilling the representee's assumptions or expectations.

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[166] Ibid 445.

[167] Ibid 487.

[168] This approach to relief was recently criticised by Elizabeth Cooke, above n 45, who argued that the courts should, so far as possible, continue to protect expectations in full. Cooke's arguments are addressed in detail in Chapter 8 below.

Mason CJ suggested in *Verwayen* that there are three situations which might justify a court in making an assumption good.[170] The first is where there has been reliance on an assumption for an extended period, the second is where the representee has suffered substantial and irreversible detriment in reliance on the assumption, and the third is where detriment cannot satisfactorily be compensated or remedied by any means short of fulfilling the representee's expectations. It is arguable that the first two of those situations are encompassed by the third, and that the court should only grant expectation relief where the nature or extent of the detriment suffered by the representee is such that it cannot satisfactorily be compensated or remedied without fulfilling the representee's expectations.

The result in *Verwayen* can be accommodated within that approach. The principal difference between the majority and the minority judges was whether there was adequate proof that Mr Verwayen had suffered increased stress, anxiety and ill health as a result of his reliance on the assumption that the Commonwealth would not dispute liability. If one accepts that the evidence was sufficient, then clearly such detriment could not be adequately compensated or reversed if the Commonwealth were allowed to depart from the assumption. Although common law courts routinely calculate damages to compensate for such loss, such damages do not have the effect of reversing or preventing the detriment suffered, but are merely designed to make good the plaintiff's loss 'so far as money can do.'[171] An analogy might be drawn between the grant of expectation-based relief in an estoppel case such as *Verwayen* and relief *in specie* elsewhere in equity. A court of equity will make an order for 'specific performance instead of damages, only when it can by that means do more perfect and complete justice'.[172] Similarly, it could be said that, where a person would suffer substantial physical or mental pain as a result of

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[169] Above, n 147.

[170] (1990) 170 CLR 394, 416.

[171] *Todorovic v Waller* (1981) 150 CLR 402, 412 (Gibbs CJ and Wilson J).

[172] *Wilson v Northampton and Banbury Junction Railway Company* (1874) LR 9 Ch App 279, 284, cited with approval in *Dougan v Ley* (1946) 71 CLR 142, 150 (Dixon J).

reliance on a representation if the representor were allowed to resile from it, then the relevant assumption should be fulfilled in order to do more complete justice than an order for monetary compensation would provide.[173] As Dawson J observed in coming to the conclusion that Verwayen's equity could only be satisfied by fulfilling his assumption: 'justice cannot always be measured in terms of money'.[174]

A further reason for granting expectation relief which was not discussed in *Verwayen* has been advanced by Heydon and Loughlan. Modern English authority, according to Heydon and Loughlan, suggests that 'the remedy should be designed to reverse the plaintiff's detriment rather than make good the plaintiff's expectation, unless his expectation is of less value than his detriment'.[175] That interpretation is borne out by the recent case of *Baker v Baker*,[176] in which the English Court of Appeal substituted an expectation-based remedy for the reliance-based relief granted by the trial judge, on the basis that the expectancy was less valuable than the detriment suffered by the representee.[177]

(d) Is there any difference?

Justice Priestley, writing extra-judicially, has suggested that 'there may not in the end be any great difference' between the reliance-based approach to relief adopted by Mason CJ and the expectation-based approach favoured by Deane J

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[173] As noted above, however, McHugh J said in *Verwayen* that 'even if the plaintiff had sought to make out a case along these lines [based on worry and stress suffered as a result of reliance on the representation], his equity would be satisfied by an award of compensation for that additional worry and stress': (1990) 170 CLR 394, 504.

[174] Ibid 461, quoting *Ketterman v Hansel Properties* [1987] AC 220 (Lord Griffiths).

[175] Heydon and Loughlan, above n 99, 398.

[176] (1993) 25 HLR 408 (discussed above, n 11).

[177] Interestingly, the result in such a case would appear to be different in the United States, where the unjust enrichment of the promisor would be taken into account. Comment d to s 90 of the Restatement of Contracts (2d) suggests that '*Unless there is unjust enrichment of the promisor*, damages should not put the promisee in a better position than performance of the promise would have put him.' (Emphasis added). In *Baker v Baker*, the representors were unjustly enriched by the representee's contribution of £33,950 to the representors' house purchase.

in *Verwayen*.[178] Indeed, he suggested that he could not construct any plausible situation in which a court would reach a different result, depending on whether it adopted the view of Mason CJ or Deane J.[179] It is possible to suggest such a scenario, similar to the facts of *Jackson v Crosby (No 2)*.[180] Assume A and B are in a relationship and are planning to live together in a house owned by A, which is then worth $150,000. A gratuitously promises to transfer to B a half interest in the house property. In reasonable reliance on that gratuitous promise, and with A's knowledge, B expends $50,000 on improvements to the property, increasing its value to $200,000.[181] A and B then part company, and A refuses to transfer the promised interest to B.

According to Justice Deane's approach, the *prima facie* position is that B's expectations should be fulfilled unless that would cause injustice to A. The court should, therefore, order A to transfer the half interest to B, or order payment of equivalent damages or compensation in the sum of $100,000.[182] The only question is whether that would be unjust to A. It is difficult to see why that would be so, unless it were regarded as unjust to provide an expectation remedy when a reliance remedy is available, which would seem to be inconsistent with the tenor of Justice Deane's judgment. It should be noted, though, that B's *prima facie* right to expectation relief, under Justice Gaudron's approach, would be lost on the basis that 'it is clear that no detriment will be suffered other than that which can be compensated by some other remedy.'[183] Any detriment suffered by B could be compensated by ordering A to pay equitable compensation in the sum of $50,000 to B, or by granting B a lien or charge on the land to recover that amount.

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[178] Priestley, above n 146, 290.
[179] Ibid.
[180] (1979) 21 SASR 280.
[181] In this example B's restitution interest happens to be equal to his reliance interest of $50,000. As argued at the beginning of this chapter, however, the restitution interest should play no role in the determination of relief to give effect to an equitable estoppel.
[182] As a majority of the Full Court ordered in *Jackson v Crosby (No 2)* (1979) 21 SASR 280, 302 (Zelling J), 310 (Mohr J).
[183] (1990) 170 CLR 394, 487.

According to the reliance-based approach, on the other hand, the court should seek to provide relief which reverses the detriment suffered by B in reliance on the assumption that A would transfer the half interest to him. The court can do that by requiring A to pay compensation to B, or by granting a lien in favour of B, for the value of the work done, namely $50,000.[184] The reliance and expectation-based approaches would, on those facts, seem to produce quite different results. Indeed, reliance and expectation-based approaches should produce different results every time a representee has suffered quantifiable detriment, in reliance on a promise or expectation of rights, be they contractual, proprietary or otherwise, which are of greater value than the detriment. In such cases, the choice between a reliance-based approach and an expectation-based approach is a choice with significant consequences for the parties involved.[185]

D. *Application of the Principle Since Verwayen*

The above discussion traced the development of the courts' approach to equitable estoppel remedies from an expectation-based approach, to one which is now concerned primarily with protecting against detriment resulting from reliance. The approach adopted by five members of the High Court in *Verwayen* requires a court, in giving effect to an equitable estoppel, to satisfy the minimum equity. That means the court is required to grant relief which does no more than is necessary to prevent detriment being suffered by the representee as a result of his or her reliance on the representor's conduct. The court should provide expectation relief only when the detriment cannot be avoided by another means. The following discussion will consider the way in which that approach has been carried into effect in the seven years since *Verwayen*.

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[184] As Cox J would have ordered in *Jackson v Crosby (No 2)* (1979) 21 SASR 280, 307, but only because on the facts of that case the promise was unclear.

[185] An example of a case in which a representee suffered quantifiable detriment which was substantially less valuable than the benefit expected is *The Public Trustee, as Administrator of the Estate of Williams (dec'd) v Wadley* (Full Court of the Supreme Court of Tasmania, Wright, Crawford and Zeeman JJ, 27 June, 1997), discussed below, text accompanying n 217.

Similar studies have been carried out in relation to promissory estoppel in the United States under s 90 of the Restatement of Contracts (2d), most recently by Edward Yorio and Steve Thel.[186] Yorio and Thel's examination of the US cases shows that, despite the fact that most commentators consider that the objective of s 90 is to protect promisees against loss caused by reliance on a promise, the courts routinely grant expectation relief in promissory estoppel cases.[187] A number of surveys cited by Yorio and Thel show that the remedies routinely granted under s 90 are specific performance and expectation damages, with negative injunctions being granted in cases where a promisor undertakes to refrain from acting in a particular way.[188] Reliance damages are awarded only rarely, according to Yorio and Thel, 'and then only if no promise is made out or proven or if expectation damages are difficult to determine. Otherwise the courts grant expectation relief.'[189] An examination of the recent Australian cases reveals a surprisingly similar tendency towards expectation relief, although in Australia it seems that is more a consequence of giving equitable estoppel a preclusionary operation, similar to that of common law estoppel, than a consequence of giving the equitable doctrine a contractual operation.

Suggestions that equitable estoppel is frequently being pleaded[190] are borne out by the fact that there have been have been thirty reported cases since *Verwayen*

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186 Yorio and Thel, above n 13.

187 A number of US commentators drew that conclusion before Yorio and Thel: Jay Feinman, 'Promissory Estoppel and Judicial Method' (1984) 97 *Harvard Law Review* 678, 687-8, suggested that 'the typical damage remedy applied in promissory estoppel cases is measured by the expectation interest'; Daniel Farber and John Matheson, 'Beyond Promissory Estoppel: Contract Law and the Invisible Handshake' (1985) 52 *University of Chicago Law Review* 903, 909, observed that 'reliance plays little role in the determination of remedies'; Mary Becker, 'Promissory Estoppel Damages' (1987) 16 *Hofstra Law Review*, 131, 135, concluded that the courts 'routinely award expectation damages'; W David Slawson, 'The Role of Reliance in Contract Damages' (1990) 76 *Cornell Law Review* 197, 202, noted that '[o]f the possibly hundreds of reported decisions applying promissory estoppel since 1932, only three have been widely read as holding that damages in a promissory estoppel case are limited to the reliance measure.'

188 Yorio and Thel, above n 13, 130-7.

189 Ibid 151.

190 Leopold, above n 30, 47. It has also been suggested that estoppel is 'more often cited than applied and more often applied than understood': Geoffrey Cheshire and Cecil Fifoot, 'Central London Property Trust Ltd v High Trees House Ltd' (1947) 63 *Law Quarterly Review* 283, 286.

in which pleas of equitable estoppel have been upheld.[191] In each of those cases expectation relief was granted.[192] In none of the cases did the court provide

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[191] I have attempted to cover all successful equitable estoppel cases decided after the High Court handed down its judgment in *Verwayen* in September 1990, and reported by the end of 1997. Cases such as *Ditford v Temby* (1990) 26 FCR 72, in which it was held without discussion that an estoppel would have arisen had other rights not been available, have been left out of consideration. I have also left out of consideration cases in which findings of equitable estoppel were overturned on appeal, such as *Territory Insurance Office v Adlington* (1992) 84 NTR 7 and *Trippe Investments Pty Ltd v Henderson Investments Pty Ltd* (1992) 106 FLR 214. Although Justice French's decision in *Newcrest Mining (WA) Ltd v Commonwealth* (1993) 119 ALR 423 was overturned by the Court of Appeal: *Commonwealth v Newcrest Mining (WA) Ltd* (1995) 130 ALR 193, the relevant findings on estoppel were not challenged.

[192] *Burnside Sub-Branch RSSILA Inc v Burnside Memorial Bowling Club Inc* (1990) 58 SASR 324 (declaration that defendant entitled to possession of land under invalid lease assumed valid); *Australian Workers Union (NSW Branch) v Minister for Natural Resources* (1991) 43 IR 158 (union estopped from challenging exemption after conducting proceedings on basis of its validity); *Lee Gleeson Pty Ltd v Sterling Estates Pty Ltd* (1991) 23 NSWLR 571 (bank estopped from denying existence or binding quality of promise to pay builder); *Kintominas v Secretary, Dept of Social* Security (1991) 30 FCR 475 (promisor's assets for purpose of aged pension valued exclusive of property promised to son); *Quach v Marrickville Municipal Council [No 1]* (1991) 22 NSWLR 55 (declaration confirming the priority of plaintiffs' title as represented by defendant); *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 24 NSWLR 370 (discharged guarantee enforced on basis of assumption that it would remain binding); *Tasita v Papua New Guinea* (1991) 34 NSWLR 691 (landlord estopped from denying determination of lease after representing that it would accept surrender); *Austral Standard Cables Pty Ltd v Walker Nominees Pty Ltd* (1992) 26 NSWLR 524 (specific performance of contract on basis of assumed variation as to essentiality of time); *FAI Leasing Pty Ltd v Nyst* (1992) 5 BPR 11,673 (purchaser allowed to rescind contract entered into on basis of vendor's representation that cooling off period applied); *Linter Group Ltd v Goldberg* (1992) 7 ACSR 580 (representor estopped from asserting a constructive trust after inducing representee to assume it would obtain a paramount interest in the trust property); *Spedley Securities Ltd (in liq) v Bank of New Zealand* (1992) 7 ACSR 70 (liquidator estopped from asserting that transaction was a loan after parties had acted on the assumption that it was a sale); *CSR Ltd v The New Zealand Insurance Co Ltd* (1993) Aust Contract Reports 90-034 (insurer estopped from denying that insurance policy extended to cover subsidiary of insured); *DTR Securities Pty Ltd v Sutherland Shire* Council (1993) 79 LGERA 88 (landowner estopped from denying obligation to dedicate land to council as promised); *Re Ferdinando; ex parte Australia and New Zealand Banking Group Ltd v The Official Trustee in Bankruptcy (as Trustee of the bankrupt estate of Maurice Christie Ferdinando)* (1993) 42 FCR 243 (declaration of liability under mortgage refused after mortgagee induced assumption that liability was not secured by mortgage); *Leda Commercial Properties Pty Ltd v DHK Retailers Pty Ltd* [1993] ANZ Conv R 163 (lessee estopped from denying validity of determination of lease after creating assumption that it was abandoning premises); *Lee v Ferno Holdings Pty Ltd* (1993) 33 NSWLR 404 (specific performance of invalid sublease assumed valid); *Re Neal; ex parte Neal v Duncan Properties Pty Ltd* (1993) 114 ALR 659 (bankruptcy notice set aside after creditor induced assumption that debt not due); *Newcrest Mining (WA) Ltd v Commonwealth* (1993) 119 ALR 423 (Commonwealth precluded from asserting that transfer of leases was ineffective after parties proceeded on common assumption that transfer was effective); *Commonwealth v Clark* [1994] 2 VR 333 (defendant prevented from pleading defences it represented would not be pleaded); *Drummoyne District Rugby Club Inc v NSW Rugby Union Ltd* (1994) Aust Contract Reports 90-039 (representor ordered to invite representee to participate in rugby competition as representee expected); *S & E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122 ALR 637 (specific performance of new term for sublease granted after sublessor induced assumption that notice of exercise of option for renewal not necessary); *Sharp v Anderson* (1994) 6 BPR 13,801 (representor estopped from relying on Statute of Frauds in relation to verbal testamentary promise to leave land to son); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1995) 8 ANZ Ins Cas 61-232

limited relief which simply reversed the detriment suffered by the representee, without fulfilling his or her expectations.[193] The apparent preference for expectation relief gives rise to two important questions. First, are the courts determining relief in accordance with the reliance-based approach adopted in *Verwayen*? Secondly, is there a flaw in the reliance-based approach which prevents relief in the reliance measure from being granted more often? Those questions will be addressed under the two headings below.

1. Adherence to the *Verwayen* Approach

In order to comply with the *Verwayen* approach in determining relief, a court should aim to provide the minimum remedy needed to avoid the detriment suffered by the representee as a result of reliance on the relevant assumption. Expectation relief should be granted only if there is no other way to prevent the representee from suffering detriment. In only fourteen of the successful equitable estoppel cases decided since *Verwayen*, though, did the reported judgment contain any reference to the need to determine relief in accordance with the concepts of proportionality, preventing detriment or satisfying the minimum equity.[194] It could be argued that, since *Verwayen*, it is no longer

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(club estopped from asserting continuance of contract of insurance after representing that cancellation was accepted); *Morris v FAI General Insurance Co Ltd* (1995) 8 ANZ Ins Cas 75,881 (insurer prevented from departing from representation that it would not contest liability); *Sunpost Pty Ltd v Alsons Pty Ltd* [1995] ANZ Conv R 575 (sublessor ordered to renew sublease as promised); *Blazely v Whiley* (1995) 5 Tas R 254 (purchaser granted specific performance of an anticipated contract of sale); *Forbes v Australian Yachting Federation Inc* (1996) 131 FLR 241 (representor ordered to compensate representees for expenses incurred in replacing promised equipment); *W v G* (1996) 20 Fam LR 49 (representee awarded monetary compensation for the loss of financial assistance from the representor in raising children); *Giumelli v Giumelli* (1996) 17 WAR 159 (representors ordered to transfer promised land to representee); *Woodson (Sales) Pty Ltd v Woodson (Aust) Pty Ltd* (1997) 7 BPR 14,685 (Santow J proposed making an order which would have the effect of fulfilling the representee's expectation of a sale of the trust property in a fair and equitable manner).

[193] Such limited relief has been granted in at least two unreported cases: *Adore Pty Ltd v Blenkinsop Nominees Pty Ltd* (Supreme Court of Western Australia, Malcolm CJ, 1 September 1993), discussed below nn 212-216 and accompanying text; and *The Public Trustee, as Administrator of the Estate of Williams (dec'd) v Wadley* (Full Court of the Supreme Court of Tasmania, Wright, Crawford and Zeeman JJ, 27 June 1997), discussed below n 217 and accompanying text.

[194] *Burnside Sub-Branch RSSILA Inc v Burnside Memorial Bowling Club Inc* (1990) 58 SASR 324, 346; *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 24 NSWLR 370, 389 (Kirby P); *Kintominas v Secretary, Dept of Social Security* (1991) 30 FCR 475, 484-5; *DTR Securities Pty Ltd v Sutherland Shire Council* (1993) 79 LGERA 88, 98; *Re Neal* (1993) 114 ALR 659, 669;

satisfactory simply to say that, an equitable estoppel having arisen, the representor is 'estopped' from resiling from the assumption he or she has created. Rather, the court should consider in every case what is the minimum relief necessary to do justice between the parties. Despite the apparent lack of attention paid to the minimum equity requirement, in only four of the cases under discussion can it be argued that the relief granted went further than satisfying the minimum equity. In other words, only in those cases can it be argued that the detriment suffered by the representee in reliance on the relevant assumption could have been avoided by the granting of lesser relief. The approach to relief in each of those cases will be discussed below, followed by a discussion of two unreported cases since *Verwayen* in which relief in the reliance measure has been held to represent the minimum equity.

(a) Reliance relief as the minimum equity

(i) Cases in which reliance relief was not granted

The unusual way in which estoppel was raised in *Kintominas v Secretary, Dept of Social Security* to some extent clouded the issue of relief.[195] The matter came before Einfeld J as an appeal from a decision of the Administrative Appeals Tribunal relating to the valuation of the applicant's assets for the purpose of the 'assets test' for aged pensioners. The relevant issue was whether, for the purposes of that valuation, the applicant had any subsisting interest in a house property of which she was the registered proprietor. The applicant had promised her son that she would leave the house to him in her will and would

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Commonwealth v Clark [1994] 2 VR 333, 338-44 (Marks J), 381-4 (Ormiston J); *Drummoyne District Rugby Club Inc v NSW Rugby Union Ltd* (1994) Aust Contract Reports 90-039, 89,948; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1995) 8 ANZ Ins Cas 61-232, 75,594 (Powell JA); *Sunpost Pty Ltd v Alsons Pty Ltd* [1995] ANZ Conv R 575, 578; *Blazely v Whiley* (1995) 5 Tas R 254, 276-8; *Forbes v Australian Yachting Federation Inc* (1996) 131 FLR 241, 289; *W v G* (1996) 20 Fam LR 49, 66; *Giumelli v Giumelli* (1996) 17 WAR 159, 164-6 (Rowland J); *Woodson (Sales) Pty Ltd v Woodson (Aust) Pty Ltd* (1997) 7 BPR 14,685, 14,721. It should be noted that in at least two of the other cases there was no need to discuss the minimum equity principle because the parties had accepted that expectation relief was appropriate if an estoppel was established: *Austral Standard Cables Pty Ltd v Walker Nominees Pty Ltd* (1992) 26 NSWLR 524, 538; *S & E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122 ALR 637, 651.

[195] (1991) 30 FCR 475.

allow him to reside in the house until her death. In reliance on that promise, the son expended a sum of money on improving the property. It appeared to be common ground between the parties that those circumstances gave rise to an equity in favour of the son by way of proprietary estoppel. The dispute concerned the way in which a court would give effect to that equity.

The respondent argued that the son had only a charge over the property to the extent of the sum expended on it. Although Einfeld J was 'mindful of' the minimum equity requirement, he nevertheless found that the house was beneficially owned by the son.[196] Accordingly, he ordered that the valuation of the applicant's assets should not include any amount in respect of the property in question. The effect of that order was that a court of equity would fulfil the son's expectations of an irrevocable life tenancy and eventual ownership of the property. Einfeld J did not make it entirely clear why reliance-based relief, in the form of a lien or an award of equitable compensation, was not appropriate. It seems from the report that the expenditure incurred in reliance on the relevant assumption was able to be quantified, and at the time it was incurred amounted to 'about half the then value of the house.'[197] There appeared, therefore, to be a lack of 'proportionality between the remedy and the detriment which is its purpose to avoid'.[198] The only possible explanation is that the extended period (some 15 years) during which the son relied on the relevant assumption justified the court in granting expectation relief.[199]

It also appears that reliance-based relief may have been satisfied the minimum equity in *Leda Commercial Properties Pty Ltd v DHK Retailers Pty Ltd.*[200] There, a lessee by its conduct created the impression that it was abandoning the leased premises. The lessor 'acted in reliance on the impression created by the [lessee's] conduct in acting to secure possession of the premises for

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[196] Ibid 484-6.

[197] Ibid 486.

[198] *Verwayen* (1990) 170 CLR 394, 413 (Mason CJ).

[199] Mason CJ said in *Verwayen*, ibid 416, that '[r]eliance on an assumption for an extended period may give rise to an estoppel justifying a court in requiring that the assumption may be made good.'

[200] [1993] ANZ Conv R 163.

releting.'[201] Higgins J held that, in those circumstances, the lessee was estopped from denying the validity of the lessor's determination of the lease. It was also established that the lessee had repudiated the lease by abandonment, so estoppel was an alternative ground for Justice Higgins's conclusion that the lease was at an end. Since the lease was brought to an end by the lessor's acceptance of the lessee's repudiation, though, it seems that the lessor suffered no detriment as a result of the lessee's departure from the relevant assumption. On that basis, no estoppel should have arisen.

Nevertheless, an estoppel was held to have arisen, so it is appropriate to consider whether the relief granted represented the minimum equity. It is arguable that it did not. Leaving aside the fact that the lease was at an end in any event, the relief granted would appear to have been out of proportion to the detriment suffered by the landlord. The effect of the tenant being estopped from denying the validity of the landlord's determination of the lease was that the tenant was liable for substantial damages for breach of the lease. If the only detriment suffered by the landlord was the wasted effort and expense incurred in unnecessarily securing the premises for releting, then an award of equitable compensation, of the type proposed by Brennan and McHugh JJ in *Verwayen*,[202] would appear to have been sufficient to reverse it.

The third reported case in which reliance relief may have represented the minimum equity, but was not granted, was *Re Neal; ex parte Neal v Duncan Properties Pty Ltd.*[203] That case was concerned with the validity of a bankruptcy notice. A judgment creditor entered into a deed of compromise with two debtors granting them a stay of execution in return for a cash payment and a bill of exchange. The bill was dishonoured when presented on behalf of the creditor. The creditor then represented to the debtors that it would not insist on its right to receive the proceeds of the bill if the debtors were to arrange to have $100,000 transferred to the trust account of the creditor's solicitor. In reliance

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[201] Ibid 169.
[202] (1990) 170 CLR 394, 431 (Brennan J), 504 (McHugh J).
[203] (1993) 114 ALR 659.

on that representation, the debtors incurred legal costs in seeking to make arrangements for that transfer. The creditor then sought to insist on its right to payment of the bill and later served a bankruptcy notice based on non-payment. The debtors sought to have the bankruptcy notice set aside on the ground, *inter alia*, that the creditor was estopped from insisting on its right to payment of the bill.

Drummond J held that the legal costs incurred by the debtors in reliance on the creditor's representation constituted sufficient detriment to raise an estoppel against the creditor. Referring to the requirement under *Verwayen* for proportionality between the remedy and the detriment, he said that an undertaking to pay the legal costs incurred by the debtors in reliance on the representation would have been enough to preclude a finding of estoppel. Since the creditor did not offer such an undertaking, however, the creditor was estopped from insisting on its right to payment.[204] On that basis, Drummond J ordered that the bankruptcy notice be set aside:

> on the ground [*inter alia*] that the creditor continues to be estopped from denying [the suspension of the creditor's rights] until it undertakes to pay the legal costs the debtors incurred in seeking to make arrangements for the transfer of the $100,000 to the creditor's solicitors.[205]

The effect of that decision is that a representor can avoid a remedy which has the effect of fulfilling the representee's expectations only by undertaking to reverse the relevant detriment suffered by the representee. That approach would appear to be inconsistent with those statements of principle in *Verwayen* which require a court, if possible, to frame relief which has the effect of reversing the detriment suffered by the representee, rather than fulfilling his or her

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[204] Ibid 669.
[205] Ibid 671.

expectations.[206] Drummond J could have reversed the relevant detriment by ordering the creditor to pay equitable compensation to the debtors in an amount equivalent to the legal costs unnecessarily incurred by the debtors. Although the amount of those legal costs does not appear in the report, the relief granted by Drummond J, which consisted of setting aside the bankruptcy notice and effectively forcing the issue of a new demand for the debt and a new bankruptcy notice, seems likely to have been out of proportion to the detriment suffered by the debtors.

The final case since *Verwayen* in which relief in the reliance measure could have been granted was *Forbes v Australian Yachting Federation Inc.*[207] The defendant was responsible for selecting and nominating two teams to compete in the Tornado class yachting event at the 1996 Olympic games. The defendant published certain criteria by which the selections would be made, which required participation in two nominated regattas with the same crew. In reliance on those rules, the plaintiffs incurred expenditure in competing in one such regatta, as a result of which they were ranked third. The constitution of the first ranked crew was then changed. Had the selection criteria been complied with, the plaintiffs would then have been ranked second and would have been entitled to sail in one of the defendant's two high performance boats. Contrary to the published criteria, however, the defendants allowed the change in the first-ranked crew. In order to be competitive in the second regatta, the plaintiffs purchased their own high performance boat. Santow J held that an estoppel arose against the defendant in those circumstances because the plaintiffs had planned and carried out their campaign in reliance on the assumption that the rules would be complied with. He found, however, that the detriment suffered by the plaintiffs lay in 'having to buy a fully competitive boat [for the second regatta] being denied access to the [defendant's] two boats.'[208] Santow J held

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[206] (1990) 170 CLR 394, 413 (Mason CJ), 429-430 (Brennan J), 454 (Dawson J), 501 (McHugh J).The approach also appears to be inconsistent with the *dictum* of Gaudron J, ibid 487, that 'an assumption should be made good *unless* it is clear that no detriment will be suffered other than that which can be compensated by some other remedy' (emphasis added).
[207] (1996) 131 FLR 241
[208] Ibid 288.

that it would be unconscionable for plaintiffs to bear those costs, and ordered the defendant to pay compensation to make up that detriment.[209]

Although Santow J concluded that the relief granted was proportionate to the detriment suffered by the plaintiffs,[210] that relief in fact had the effect of fulfilling the plaintiffs' expectations. The costs of acquiring the second boat were not incurred in reliance on the assumption that the published criteria would be complied with, but were in fact incurred after the defendant had announced that it was changing the criteria. The only detriment suffered by the plaintiffs in reliance on the relevant assumption was the cost of competing in the first regatta.[211] It was that reliance loss which should properly have been compensated.

(ii) Cases in which reliance relief has been granted

There have been at least two unreported cases in which reliance-based relief has been found to satisfy the minimum equity raised by an estoppel. In *Adore Pty Ltd v Blenkinsop Nominees Pty Ltd*,[212] Malcolm CJ gave effect to an equitable estoppel by awarding payment of equitable compensation which was calculated so as to reverse the detriment suffered by the representee in reliance on the relevant assumption. The dispute between the parties concerned a bowling alley leased by the representor to the representee. Prior to the expiration of the original term of the lease, the representor led the representee to believe that a binding agreement for a further lease and option to purchase the property had been concluded.[213] The representee acted on the faith of that assumption by incurring expenditure in relation to the business which it would not have incurred had it known that it did not have security of tenure. That expenditure was rendered futile when the representor resiled from the relevant

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[209] Ibid 289.
[210] Ibid.
[211] Santow J in fact held, ibid 255, that the expenses associated with the first regatta were irrelevant because the selection criteria did not change until after that regatta.
[212] Supreme Court of Western Australia, Malcolm CJ, 1 September 1993. Page numbers refer to the judgment transcript.
[213] Ibid 47.

assumption, by demanding vacant possession of the property shortly after the expiration of the original term. Malcolm CJ held that an estoppel arose against the representor in those circumstances, and held that the appropriate relief would be to award equitable compensation to the representee for the detriment suffered.[214]

The compensation which the representor was ordered to pay to the representee included amounts representing the additional expenses incurred by the representee on the assumption of continued occupancy, such as advertising and promotional expenses and additional wages incurred while the directors were engaged in promotional activities. Those expenses can legitimately be regarded as items of detriment suffered by the representee as a result of action taken in reliance on the representor's conduct. Curiously, the award of compensation also included an amount representing payments made by the representee to creditors owed money at the time the representee was forced to vacate the premises. Those payments were taken into account on the basis that they 'would have been paid from income received from the future operation of the Bowl had Adore continued to occupy the premises.'[215] If the expenses in question were incurred in reliance on the representee's assumption of continued occupancy, then they were clearly losses flowing from action taken by the representee in reliance on that assumption, and were thus compensable under the minimum equity principle. The fact that they would have been paid from future trading income does not, however, establish that they were reliance losses. Instead it characterises them as expectation losses suffered as a result of the representor's departure from the relevant assumption, which are not

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[214] This compensatory form of relief can be contrasted with the expectation relief granted in the analogous pre-*Verwayen* case *Metropolitan Transit Authority v Waverley Transit Pty Ltd* [1991] 1 VR 181. In that case the representor authority induced the representee company to believe that certain bus service licences would be renewed without recource to public tenders, and the representee incurred substantial expenditure on the faith of that expectation. O'Bryan J found that an equitable estoppel arose against the representor when it terminated the contracts and called for tenders. He gave effect to the estoppel by ordering a renewal of the contract, thus fulfilling the representee's expectations. The finding of an equitable estoppel was upheld by the Full Court, although there was no challenge to the form of relief granted by the trial judge: ibid 210.

[215] Above n 212, 55.

compensable under the High Court's interpretation of the minimum equity principle.[216]

A second unreported case in which reliance-based relief was found to represent the minimum equity was *The Public Trustee, as Administrator of the Estate of Percy Henry Williams (dec'd) v Wadley*.[217] This decision of the Full Court of the Supreme Court of Tasmania is very important, because it indicates a willingness to adopt a strict interpretation of the reliance-based approach to relief. The plaintiff was induced to believe that her father's house, which was worth $68,500 at the date of judgment, would be left to the plaintiff on her father's death. In reliance on that assumption, the plaintiff performed services for her father which she would not otherwise have performed. The father died intestate. The trial judge held that an equitable estoppel arose in favour of the plaintiff, but considered the detriment was not sufficient to justify a full proprietary interest in the property. He held that she was entitled to equitable compensation of $34,250 in lieu of a half-interest in the property. The Full Court, by majority, allowed an appeal on the basis that the remedy was excessive. Crawford and Zeeman JJ found that the plaintiff's services should have been valued at a generous hourly rate, taking into account the fact that the compensation was not paid for her services at the time the services were performed. Accordingly, the plaintiff was held to be entitled to compensation in the sum of $15,000.

The strict reliance-based approach to determining relief adopted by the Full Court contrasts sharply with the reported decisions discussed above under this heading. The willingness of the Full Court to satisfy the plaintiff's equity by means of a reliance-based award of compensation is particularly remarkable in this case because of the great difficulty of valuing the work performed by the plaintiff over a period of years. Although it is possible to criticise some of the

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[216] This aspect of the decision has been questioned by Andrew Beech, 'The Remedy for Estoppel: Identifying and Preventing Detriment' in Robyn Carroll (ed), *Civil Remedies: Issues and Developments* (1996) 156 at 180-1.

[217] Full Court of the Supreme Court of Tasmania, Wright, Crawford and Zeeman JJ, 27 June 1997.

post-*Verwayen* decisions for failing to determine relief in accordance with the reliance-based approach laid down by the High Court, the decision in *Public Trustee v Wadley* involved a very strict application of that compensatory approach to the minimum equity principle.

(b) Expectation relief as the minimum equity

In each of the other reported cases since *Verwayen*, expectation relief appeared to be the only way of satisfying the equity raised by the representor's conduct. In most of the cases, that relief can be justified on the basis that the detriment suffered by the representee in reliance on the relevant assumption could not be quantified,[218] because expectation relief neatly avoided a detriment which would have been difficult to quantify precisely,[219] or because the reliance and expectation interests coincided.[220] Expectation relief can also be justified in

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[218] *Burnside Sub-Branch RSSILA Inc v Burnside Memorial Bowling Club Inc* (expenditure incurred over 33 years); *Quach v Marrickville Municipal Council [No 1]* (expenditure incurred over 34 years); *Lee v Ferno Holdings Pty Ltd* (expenditure incurred over five years); *Commonwealth v Clark* (representee suffered stress, anxiety, effort and inconvenience as a result of reliance on assumption); *Drummoyne District Rugby Club Inc v NSW Rugby Union Ltd* (representee club arranged sponsorship, players and hiring of grounds on basis of assumption); *Sunpost Pty Ltd v Alsons Pty Ltd* (representee purchased and conducted business for some years on the basis of assumption); *Giumelli v Giumelli* (representee remained in partnership with the representors, improved the representors' land and passed up other job opportunities in reliance on the assumption).

[219] *Australian Workers Union (NSW Branch) v Minister for Natural Resources* (employer lost opportunity to seek fresh exemption which would not have been open to challenge); *Lee Gleeson Pty Ltd v Sterling Estates Pty Ltd* (builder lost opportunity to secure payment by other means); *Corumo Holdings Pty Ltd v C Itoh Ltd* (creditor lost opportunity to obtain substitute guarantee); *Austral Standard Cables Pty Ltd v Walker Nominees Pty Ltd* (vendor lost opportunity to complete contract on time); *FAI Leasing Pty Ltd v Nyst* (purchaser entered into contract on basis of assumption that it could rescind); *DTR Securities Pty Ltd v Sutherland Shire* Council (council lost opportunity to require dedication of land); *S & E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (sublessee lost opportunity to exercise option for renewal of lease); *Sharp v Anderson* (son invested savings into house for his mother, losing opportunity to purchase own property); *CIC Insurance Ltd v Bankstown Football Club Limited* (insurer lost opportunity to cancel policy); *Blazely v Whiley* (representees were exposed 'to an inconvenient and noisy environment', lost the opportunity to buy their own house and spent money on maintenance and improvements: (1995) 5 Tas R 254, 276); *Woodson (Sales) Pty Ltd v Woodson (Aust) Pty Ltd* (representee entered into a complex commercial arrangement on the faith of the assumption in question). In *Sunpost Pty Ltd v Alsons Pty Ltd* [1995] ANZ Conv R 575, 578, Bryson J justified granting expectation relief on the following basis:

> I do not have confidence in achieving a just result by attempting to assess a sum of money to be paid as a condition of allowing the first defendant to rely on its legal rights. The principles for assessment of compensation would not be clear or simple.

[220] *CSR Ltd v The New Zealand Insurance Co Ltd* (1993) Aust Contract Reports 90-034, 89,745 (insured failed to obtain a substitute insurance policy on the assumption that activities of

some of the cases on the basis that the relevant assumption was relied upon for an extended period of time,[221] or because the expectation was of less value than the detriment.[222] In *W v G*, the granting of expectation relief may be explicable on the basis that the representee's reliance loss, the effort and expense of raising two children, exceeded the value of the financial and other assistance which the representee expected to receive from the representor.[223] There are several cases in which it is not clear from the report what detriment was suffered in reliance on the relevant representation: either because it was not clear what action was taken in reliance on the relevant representation,[224] or because the representor's departure from the assumption did not appear to cause the representee to suffer detriment.[225] In those cases, it is not possible to identify the minimum equity arising out of the representor's conduct.

2. Conclusions to be Drawn

The above discussion considers cases decided over the relatively short period of seven years since the High Court in *Verwayen* laid down a new approach to the formulation of relief in equitable estoppel cases. Obviously, it will take some time for the new approach to be widely understood and accepted.

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subsidiary were covered by existing policy); *Morris v FAI General Insurance Co Ltd* (1995) 8 ANZ Ins Cas 75,881 (plaintiff refrained from instituting proceedings within limitation period on faith of defendant's admission of liability). In each of those cases it was clear that the detriment suffered by the representee as a result of reliance on the relevant assumption coincided with the benefit expected by the representee. It may be possible to rationalise some of the cases listed above in n 219 in the same way.

221 *Burnside Sub-Branch RSSILA Inc v Burnside Memorial Bowling Club Inc*; *Quach v Marrickville Municipal Council [No 1]*; *Lee v Ferno Holdings Pty Ltd*; *Sharp v Anderson.*

222 As previously discussed, Heydon and Loughlan, above n 99, suggest that in such circumstances expectation relief should be preferred to reliance relief. In *Burnside Sub-Branch RSSILA Inc v Burnside Memorial Bowling Club Inc*, the expectancy, a lease with only 7 years left to run, may have been of less value than the detriment, which consisted of considerable expenditure incurred over a period of 33 years.

223 (1996) 20 Fam LR 49.

224 *Tasita v Papua New Guinea*; *Spedley Securities Ltd (in liq) v Bank of New Zealand; Re Ferdinando.* The issue of the representees' detrimental reliance in *Re Ferdinando* is discussed in Andrew Robertson, 'Limits on the Recovery of Secured Debts: Estoppel and Section 52' (1994) 5 *Journal of Banking and Finance Law and Practice* 211.

225 *Linter Group Ltd v Goldberg* (Southwell J held that no constructive trust could be asserted by the representor because the trust moneys could not be traced; accordingly, departure by the representor from the assumption it induced, that it would not assert its rights as beneficiary, did not cause detriment to the representee); *Leda Commercial Properties Pty Ltd v DHK Retailers*

Nevertheless, in the short time since *Verwayen* some patterns are emerging, and some conclusions can be drawn.

First, it seems that the courts have not all embraced the reliance-based approach to relief laid down by the High Court in *Verwayen*. It is clear from the judgments since *Verwayen* that many Australian judges still instinctively give equitable estoppel, like common law estoppel, a preclusionary operation. That instinct leads to the conclusion that a representor is 'estopped' from resiling from a relied-upon representation, rather than a finding that an equity has arisen by way of estoppel and relief must be granted to prevent the representee from suffering detriment as a result of his or her reliance on the relevant assumption.[226] Secondly, it is clear that, even if the reliance-based approach is strictly applied, the circumstances will often require the grant of expectation relief on the basis that the detriment suffered by the representee cannot be prevented in any other way. That seemed to be the case in at least 22 of the 30 reported decisions discussed.[227] A number of commentators have suggested that, under the approach adopted in *Verwayen*, it will only be in exceptional circumstances that gratuitous promises will be enforced, and the remedy will normally be restricted to reversing detriment.[228] The above examination of the early post-*Verwayen* cases strongly suggests the opposite conclusion.

Pty Ltd (departure by tenant from the assumption induced by its conduct did not affect landlord because the lease was at an end in any event).

[226] One of the post-*Verwayen* decisions, that of the Queensland Court of Appeal in *Morris v FAI General Insurance Co Ltd* (1995) 8 ANZ Ins Cas 75,881, has been criticised for failing to 'explore in any depth the process of determining the appropriate remedy': Des Butler, 'Admissions of liability in Litigation: Contractual Undertakings and Estoppel' (1995) 25 *Queensland Law Society Journal* 591, 594.

[227] This conclusion is arrived at by excluding from the 30 cases under discussion those four cases in which reliance relief could have been granted, and the four others in which it was not clear what relevant detriment would be suffered by the representee if the representor was allowed to depart from the assumption in question.

[228] JW Carter, 'Chapter 2: Australia' in Ewoud Hondius (ed), *Precontractual Liability* (1991) 29, 37 ('it would not be going too far to say that compensation for loss by reliance or in respect of benefits conferred, rather than expectation damages, is more likely to be the norm'); Justine Munro, 'The New Law of Estoppel' (1993) 23 *Victoria University of Wellington Law Review* 271, 280 ('it is only in exceptional cases that the court will order that the party estopped be held to the assumption created'); Derek Davies, 'What Should Happen When Developments Outpace Origins?' in Malcolm Cope (ed), *Equity: Issues and Trends* (1995) 7 ('Estoppel does not enforce gratuitous promises save in exceptional circumstances where there is no viable alternative. Ordinarily the remedy will be restricted to a correction of the detriment actually suffered').

Since the courts in the United States and England have also shown a consistent preference for expectation relief, it is illuminating to compare the conclusions which have recently been drawn by commentators in those jurisdictions, and to consider the applicability of those conclusions in Australia. In their article, Yorio and Thel argue that, since issues of liability and remedy turn on promise, the true basis of promissory estoppel in the US is promise, not reliance.[229] They claim that finding undermines the suggestions made by Grant Gilmore[230] and Patrick Atiyah[231] that contract law is being absorbed into a general theory of civil liability based on the tort concept of compensation for harm.[232] Reliance, like consideration, serves the function of screening for serious promises, according to Yorio and Thel. If a promise is identified as serious, they suggest, the court will enforce it by means of expectation relief.[233]

There are at least three reasons why those conclusions cannot be drawn in Australia, despite an apparent similarity in the preference for expectation relief. First, in the United States promissory estoppel is seen as part of the law of contract, with reliance on a promise acting as a substitute for consideration and giving rise to what is often referred to as a 'contract'.[234] In the Second Restatement of the Law of Contracts, s 90 appears under the heading 'Contracts Without Consideration'. In Australia, on the other hand, promissory estoppel is a purely equitable doctrine which is still enforced exclusively by way of equitable remedies. The High Court of Australia has in recent years consistently take pains to distance equitable estoppel from the law of

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229 Yorio and Thel, above n 13, 113.

230 Grant Gilmore, *The Death of Contract* (1974) 87 *et seq.*

231 Such as PS Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 777. See also: Jane Swanton, 'The Convergence of Tort and Contract' (1989) 12 *Sydney Law Review* 40; Nicholas Seddon, 'Australian Contract Law: Maelstrom or Measured Mutation' (1994) 7 *Journal of Contract Law* 93, 94.

232 Yorio and Thel, above n 13, 115. See also Faber and Matheson, above n 187, 905.

233 Ibid 113.

234 See, for example, E Allan Farnsworth, *Contracts* (2nd ed, 1990) 102. In *Waltons Stores* (1988) 164 CLR 387, 401-2, Mason CJ and Wilson J explain the contractual nature of promissory estoppel in the United States as a response to the constraining effects of the bargain theory of consideration.

contract.[235] Secondly, in Australia, unlike the United States, issues of liability consistently turn on reliance, rather than promise, as Chapters 3-6 of this thesis have shown. This question will be discussed in more detail in Chapter 8 below. Thirdly, equitable estoppel has only recently begun to be seen as a substantive doctrine in Australia, and a reliance-based approach to relief has even more recently been adopted to give effect to that doctrine. Australian lawyers' perception of estoppels as preclusionary doctrines has evoked an instinct for expectation relief.[236] That instinct should gradually disappear as the 'new equitable estoppel'[237] comes to be more widely understood. The decision of the Full Court of the Supreme Court of Tasmania in *Public Trustee v Wadley* provides a striking illustration of the shift effected in *Verwayen* from a preclusionary approach to remedy to a compensatory one.

Hugh Collins has argued that the preference for expectation relief in England undermines claims that equitable estoppel in that country is based on reliance, and that its purpose is merely restorative.[238] Collins uses the preference for expectation relief to criticise the notion that the purpose of equitable estoppel lies in compensating losses which individuals have suffered as a result of reliance on others. Collins acknowledges that the restorative theory of the reliance model is supported by the way in which the courts approach the establishment of an estoppel, focussing on the change of position, but argues that it fails to account for the fact that the courts use this test of liability to put a

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[235] See, for example, *Waltons Stores*, ibid 400-1 (Mason CJ and Wilson J), 423-7 (Brennan J); *Verwayen* (1990) 170 CLR 394, 439-40 (Deane J) 453 (Dawson J), 501 (McHugh J).

[236] This tendency was particularly marked in Justice Wilcox's interpretation of the proportionality principle (that is, the principle that the remedy must be proportional to the detriment suffered) in *Lyndel Nominees Pty Ltd v Mobil Oil Australia Ltd* (1997) 37 IPR 599. As discussed in Chapter 4, Wilcox J held that, because of the need for proportionality between the remedy and the detriment, a promissory estoppel could only arise where the detriment suffered by the representee in reliance on the relevant assumption was proportional to the expectation or to the relief claimed by the representee. It seemed that the only remedy Wilcox J would consider granting was the fulfilment of the representees' expectations. In order to ensure proportionality between the detriment and the remedy, therefore, the detriment had to be proportional to the expectation in order to make out an estoppel.

[237] Mark Dorney, 'The New Estoppel' (1991) 7 *Australian Bar Review* 19, 46.

[238] Hugh Collins, *The Law of Contract* (1st ed, 1986) 44, attributing such a claim to PS Atiyah, 'Contracts, Promises and the Law of Obligations' (1978) 94 *Law Quarterly Review* 193. These issues are given a slightly different treatment in the 2nd edition of Collins' work: *The Law of Contract* (2nd ed, 1993) 84-7, which will be discussed in Chapter 8 below.

person in a better position than he or she was originally. The fact that cases such as *Pascoe v Turner* involve the enforcement of promises, according to Collins, indicates that the purpose of the reliance model is not simply restorative but includes the encouragement of certain kinds of economic relations by making the position of one who acts in reliance on others financially secure.[239] The crucial difference between Australian law and English law in this regard is that, since *Verwayen*, the purpose of granting relief in Australia *is* restorative. In due course the Australian cases should, like *Public Trustee v Wadley*, begin to reflect the new orientation towards compensation for harm, and away from the fulfilment of expectations.

3. Problems with the Reliance-Based Approach

In *Commonwealth v Clark*[240] the Victorian Full Court subjected the reliance-based approach laid down in *Verwayen* to a thorough analysis. The facts of *Clark* were almost identical to those in *Verwayen*. Mr Clark was also a member of the Royal Australian Navy injured in the Voyager collision in 1964. He commenced action against the Commonwealth in August 1985 in reliance on representations that the Commonwealth would not take advantage of defences open to it. In February 1986 the Commonwealth indicated that it would defend the action and would rely on the two defences in question. The most important difference between *Clark* and *Verwayen* was that, since the High Court's decision in *Verwayen* had been handed down by the time *Clark* came to trial, Clark did provide evidence to substantiate the detriment he would suffer as a result of reliance on the Commonwealth's representations if it were allowed to resile from the assumption it created.

The trial judge found that Clark had participated in the litigation as a result of the Commonwealth's representations and, in doing so, incurred a debt of $10,000 as well as stress, anxiety, effort and inconvenience. He found that detriment to be such that the minimum equity required to do justice between

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[239] Hugh Collins, *The Law of Contract* (1st ed, 1986) 44.
[240] [1994] 2 VR 333 ('*Clark*').

the parties was to hold the Commonwealth to its original representations that it would not plead the relevant defences. The Commonwealth's appeal from that decision was dismissed by the Full Court. Fullagar J found that there was no material distinction between the facts of *Verwayen* and the facts of the present case. Since there was no clearly binding *ratio decidendi* in the High Court's decision, the Full Court was obliged to follow its own previous decision.[241] Marks J found the minimum equity concept unhelpful in framing relief, preferring the formulation that allows a court to grant whatever relief is necessary to prevent unconscionable conduct and to do justice between the parties.[242] He dismissed the appeal, adopting the reasoning of Deane and Dawson JJ in *Verwayen*.[243]

Ormiston J, on the other hand, adopted an interpretation of the approach to relief in the judgments of the High Court in *Verwayen* which is more consistent with the interpretation adopted in this thesis:

> In my opinion, although I am more inclined to favour Deane J's analysis in that it would more evenly place the competing considerations on the scales, I feel obliged to accept that the other members of the court, with the possible exception of McHugh J (who might take a more stringent approach), would appear to have held that the relevant equity does not in every case require the party sought to be bound to fulfil the assumption and is designed primarily to avoid the detriment which the court sees as likely to flow from the non-fulfilment of the assumption.[244]

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[241] Ibid 335.

[242] Ibid 342-3. This type of approach, which emphasises the flexibility available to the court, has been criticised in England by Oughten, above n 102; AS Burrows, 'Contract, Tort and Restitution - A Satisfactory Division of Not?' (1983) 99 *Law Quarterly Review* 217, 243 and Smith, above n 103, 239-246. The approach has, however, received some support in the United States: Comment, 'Once More into the Breach: Promissory Estoppel and Traditional Contract Doctrine' (1970) 37 *Chicago Law Review* 559, 564-5, and in Australia from Tilbury, above n 30, 77, who suggests that the measure of the relief in equitable estoppel is entirely a matter of discretion, and any attempt to prescribe either expectation or reliance loss as the *prima facie* measure of damages is fundamentally misconceived.

[243] [1994] 2 VR 333, 343-4.

[244] Ibid 383.

Applying that approach, Ormiston J found that the detriment suffered by Clark was such that it could not 'be fairly compensated except by holding the Commonwealth to the assumptions which it induced'.[245] Both Marks J and Ormiston J seemed to be opposed to the reliance-based approach and, in the course of their respective judgments, raised a number of important issues which have the potential to undermine the viability of that approach. The principal problems raised in those judgments will be addressed under the four headings below.

(a) Estoppel as a defensive equity

The first challenge made by Marks J to the reliance-based approach was to question its application in cases where equitable estoppel is raised defensively. Marks J noted that, in the Victorian Full Court's decision in *Verwayen*:[246]

> the majority took the view that the doctrine [of promissory estoppel] was capable of being relied on as an answer and would succeed as such in the same way as estoppel at common law, that is, if it were established.[247]

On that interpretation, the minimum equity principle does not apply where promissory estoppel, or indeed any equitable estoppel, is raised as a defence. The estoppel simply has a preclusionary effect, and the parties' rights are determined according to the state of affairs which the plaintiff representor induced the defendant representee to assume existed. Equitable estoppel would then in many cases afford a complete defence. As Marks J noted,[248] however, in *Verwayen*, Brennan J appeared to take a different view of the effect of equitable estoppel when raised in answer to a defence:

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[245] Ibid 384.
[246] *Verwayen v The Commonwealth (No 2)* [1989] VR 712.
[247] [1994] 2 VR 333, 337.

> In strict theory, a party who is entitled to equitable relief to make good some detriment suffered in reliance on a promise has a cause of action rather than an answer to a plea raised by a defendant-promisor in proceedings to enforce another cause of action. But when an equity by way of estoppel is raised as an answer to a plea in a defence which a defendant promisor seeks to raise contrary to his promise, it may be appropriate to give effect to the defence on terms that the defendant-promisor satisfy the plaintiff's equity.[249]

By parity of reasoning, it would seem clear that where estoppel is raised as a defence, then the court should give judgment for the plaintiff on terms that require the plaintiff to satisfy the defendant's equity. As Marks J noted in *Clark*, although Justice Brennan's view was not explicitly supported by the other members of the High Court in *Verwayen*, all members of the Court 'accepted the relevance of the extent of detriment to the availability of equitable estoppel as an answer'.[250]

Marks J suggested, however, that where estoppel is raised defensively, Deane J would perhaps only relate the representee's detriment to the question whether it was unconscionable to depart from the relevant assumption. In other words, the representee's detriment would only be relevant to the question whether an estoppel was made out. If material detriment was not made out, then the plea would fail. If it was made out, then estoppel would operate as a complete answer to the plaintiff's claim. When raised defensively, equitable estoppel would then 'become an all or nothing plea to be determined in the same way as estoppel at common law.'[251] Marks J conceded, though, that the law 'has not yet rationalised itself in this way.'[252] Indeed, it would not appear that Justice Deane's judgment supports such a rationalisation. His statement of the principles of estoppel by conduct in *Verwayen* would tend to suggest that he

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[248] Ibid.
[249] (1990) 170 CLR 394, 430.
[250] [1994] VR 333, 338.
[251] Ibid 341.
[252] Ibid.

supports Justice Brennan's analysis. Deane J said that the assumed fact or state of affairs may be relied upon defensively and went on to say, without distinguishing between a defensive or aggressive use of the doctrine, that the *prima facie* entitlement to relief based on the assumed state of affairs will be qualified in a case where such relief would exceed what could be justified by the requirements of good conscience.[253]

The other judgments show a similar failure to distinguish between the effect of an equitable estoppel raised defensively and one raised aggressively. Mason CJ, for example, made no such distinction when he said that 'as a matter of principle and authority, equitable estoppel will permit a court to do what is required in order to avoid detriment to the party who has relied on the assumption induced by the party estopped, but no more.'[254]

If the purpose of equitable estoppel is to prevent detriment resulting from reasonable reliance on the conduct of others, then there is no legitimate reason to distinguish between a defensive use of such an estoppel and an aggressive use. Indeed, in many cases, the question whether an estoppel is raised aggressively or defensively will depend only on who is the first to institute proceedings. If, for example, a tenant expends money on the faith of a representation by the landlord that a lease is valid, then either party might institute proceedings in the event that the landlord subsequently sought to deny the validity of the lease. According to Justice Marks's analysis, the outcome would depend on who sued first. If the tenant sues, claiming relief on the basis of equitable estoppel, then the court may compensate the tenant for the expenditure, on the basis that such relief represents the minimum necessary to prevent detriment. If the landlord seeks to evict the tenant, and the estoppel is raised defensively by the tenant, then the estoppel has a preclusionary operation, preventing the landlord from denying the truth of the representation that the lease is valid. Such an anomaly would be avoided if the minimum

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[253] (1990) 170 CLR 394, 445.

[254] Ibid 412 (Mason CJ). Similarly unqualified statements were made at 454 (Dawson J), 475-6 (Toohey J), 487 (Gaudron J),501 (McHugh J).

equity requirement was applied, as the judgments in *Verwayen* seem to suggest, in the case of a defensive plea as well as an aggressive one.

There remains the problem of pleading, which was raised by Marks J in *Clark* as follows:

> I refer briefly to the pleading problem which emerges from *Verwayen's Case*. It is whether promissory estoppel may be pleaded as an answer to a defence or a claim as distinct from being pleaded as a cause of action in itself.[255]

That problem raises questions of great practical importance. Must equitable estoppel be raised by way of cross claim, rather than a defence? Where equitable estoppel is raised in a defence, can a court grant anything other than expectation relief to the defendant? If equitable estoppel is not strictly a defence, but a right to relief to satisfy an equity, then equitable estoppel strictly should not be pleaded as a defence, except perhaps where it is clear that the equity raised by the plaintiff's conduct can only be accounted for by denying his or her cause of action. In all other cases in which a representor asserts a cause of action which is inconsistent with representations relied upon by the representee, the representee should plead equitable estoppel by way of a cross claim.[256]

On the other hand, the statement of Brennan J quoted above strongly suggests that a defendant need not plead a defensive equity by way of a cross claim in order to obtain relief.[257] The court can presumably, in such circumstances, grant the relief claimed by the plaintiff, subject to an order reversing the detriment suffered by the defendant. Such an approach is consistent with the High Court's recent confirmation of the flexibility enjoyed by courts of equity in giving

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[255] [1994] 2 VR 333, 337.

[256] In *Prudential Building and Investment Society of Canterbury v Hawkins* [1997] 1 NZLR 114, 121, Hammond J observed that, although equitable estoppel was raised in that case as a defence, it was 'functionally raised in the character of a counterclaim.'

[257] Although Leopold, above n 30, 54, suggests that it would be prudent to do so.

effect to equitable defences. In *Vadasz v Pioneer Concrete (SA) Pty Ltd*, in the context of partially setting aside a guarantee on the ground of misrepresentation, the court said that '[t]he concern of equity, in moulding relief between the parties is to prevent, nullify, or provide compensation for, wrongful injury.'[258] As Meagher, Gummow and Lehane have observed, '[i]n giving effect to its doctrines, equity has wide powers ... And it may, unlike the common law, impose terms as the price of relief.' [259]

(b) Compensation in equity

The second challenge made by Marks J to the reliance-based approach to relief related to the appropriateness of compensation as an equitable remedy. Marks J suggested that the word 'minimum' in the expression 'minimum equity' is not to be given its literal meaning, and implicitly disapproved of suggestions by Mason CJ and Brennan J that the monetary equivalent of financial loss can be granted. He did not see how such a common law remedy 'could be reconciled with the preservation of equitable estoppel and the equitable nature of the remedy.'[260] Similarly, in *Verwayen* Deane J said that:

> estoppel does not of itself provide a cause of action in equity for non-traditional equitable relief in the form of compensatory damages, under Lord Cairns' Act or subsequent statutory provisions, for the detriment caused by a departure from an otherwise unenforceable promise as to future conduct.[261]

Prior to *Waltons Stores*, Paul Finn observed that equity was unable to remedy detriment suffered as a result of the representee's reliance because it lacked the power to make compensatory damages awards.[262] Finn suggested that it was

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[258] *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102, 115-6 (Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[259] RP Meagher, WMC Gummow and JRF Lehane, *Equity: Doctrines and Remedies* (3rd ed, 1992) 432.
[260] [1994] 2 VR 333, 342.
[261] (1990) 170 CLR 394, 439.
[262] PD Finn, 'Equity and Contract' in PD Finn (ed), *Essays on Contract* (1987) 104, 119.

perhaps the lack of a compensatory jurisdiction which led to the emphasis on expectations.[263] He also suggested that the inability of courts to make compensatory awards confined equity to the prevention of unconscionable insistence on the rights of representors.[264] The justification for confining equity to representations of existing rights, according to Finn, was open to serious question, and there was much to be said for a move towards a partial fusion of equitable and common law concepts which would allow the protection of the representee's reliance interest.[265] Absent the unification of common law and equitable estoppel which would achieve that effect, the essential question is whether courts of equity have power to give effect to estoppel by way of compensation for reliance loss. There are two sources of jurisdiction to order payment of monetary compensation available to a court of equity which could potentially be used, each of which will be examined in turn.

(i) Damages under Lord Cairns' Act

The remedy granted in many equitable estoppel cases is an award of equitable damages in lieu of specific performance of a contract. Courts of equity have jurisdiction to award damages in such circumstances under provisions in each jurisdiction re-enacting s 2 of the Chancery Amendment Act 1858 (UK),[266] known as Lord Cairns' Act. In Australia the provisions vary from jurisdiction to jurisdiction, but most provide in essence that, where the court has power to grant an injunction against the commission of a wrongful act or to order specific performance of any contract, the court may award damages to the party injured, either in addition to or in substitution for an order for the injunction or specific performance.[267] There are two potential limitations on the use of Lord

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[263] Ibid 122.
[264] Ibid 116.
[265] Ibid 116, 119-20.
[266] 21 & 22 Vict c 27.
[267] The principal provisions are: Supreme Court Act 1933 (ACT), s 11(a); Supreme Court Act 1970 (NSW), s 68; Supreme Court Act 1979 (NT), s 14(1)(b); Equity Act 1867 (Qld), s 62 (as saved by The Statute Law Revisions Act 1908 (Qld), s 2(iv); Supreme Court Act 1935 (SA), s 30; Supreme Court Civil Procedure Act 1932 (Tas), s 11; Supreme Court Act 1986 (Vic), s 38; Supreme Court Act 1935 (WA), s 25. See generally Peter McDermott, *Equitable Damages* (1994).

Cairns' Act to give effect to equitable estoppel. First, there is the argument that Lord Cairns' Act does not empower a court to award damages in substitution for injunctions in aid of purely equitable rights and, secondly, there is the requirement that equitable damages awarded in substitution for an injunction or specific performance must be calculated so as to provide a true substitute for such specific relief.

Meagher, Gummow and Lehane have argued for some time that Lord Cairns' Act should be construed as applicable only in equity's auxiliary jurisdiction, the reference to 'wrongful acts' in the statute being confined to legal wrongs.[268] The weight of authority is, however, against such an interpretation.[269] Indeed, the decision in *Waltons Stores* is against such an interpretation, at least on the approach of Mason CJ and Wilson and Brennan JJ: Lord Cairns' Act damages were awarded even though no legal wrong was committed by Waltons. Moreover, the reformulation of the provision in some jurisdictions to omit the expression 'wrongful act' would seem to make it clear in those jurisdictions that equitable damages can be awarded in the case of the infringement of a purely equitable obligation.[270] The second limitation is, therefore, likely to be of greater practical relevance than the first.

In *Wroth v Tyler* Megarry J held that the then English provision 'envisages that the damages awarded [in substitution for specific performance] will in fact constitute a true substitute for specific performance.'[271] Although the Lord Cairns' Act provisions typically provide that the damages 'may be assessed in such manner as the court shall direct', that does not appear to give the court a discretion as to the basis on which damages should be calculated. In *Johnson v Agnew*, Lord Wilberforce, with whom the other members of the House of Lords agreed, expressed the opinion that the words do not give the court any such discretion, but refer only to the procedure by which the damages are

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[268] Meagher, Gummow and Lehane, above n 259, 649-50.
[269] McDermott, above n 267, 153-5.
[270] Ibid 155.
[271] [1974] Ch 30, 58.

assessed.[272] Equitable damages awarded in lieu of specific performance are to be assessed on the same compensatory principle as common law damages, 'ie that the innocent party is to be placed, so far as money can do, in the same position as if the contract had been performed.'[273]

Unless the Australian courts are prepared to depart from that interpretation, [274] it seems that Lord Cairns' Act damages will only be useful in those estoppel cases, such as *Waltons Stores* and *Jackson v Crosby (No 2)*,[275] where the court wishes to provide monetary relief in the expectation measure. The true substitute principle logically requires damages awarded in lieu of specific performance to be calculated on an expectation basis[276] and will, if maintained, prevent the use of the Lord Cairns' Act jurisdiction to award reliance damages in estoppel cases. The only means of awarding monetary compensation for reliance loss, then, is by invoking equity's inherent jurisdiction to order payment of compensation.

(ii) Equitable compensation

An order for the payment of compensation for breach of a purely equitable obligation is a remedy most commonly granted to provide restitutionary relief against defaulting fiduciaries. As McLelland J observed in *United States Surgical Corporation v Hospital Products Pty Ltd*, however, a court of equity 'has an inherent power to grant relief by way of monetary compensation for breach of a fiduciary *or other equitable obligation*'.[277] The New Zealand Court

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[272] [1980] AC 367, 400.

[273] Ibid.

[274] As one commentator has suggested they should: RP Austin, 'Moot Point' (1974) 48 *Australian Law Journal* 273, 274.

[275] (1979) 21 SASR 280. McDermott, above n 267, 186, seems to suggest that the court in *Jackson v Crosby* could have ordered payment of reliance damages under the South Australian equivalent of Lord Cairns' Act. It is not clear, though, how that is possible under the true substitute principle, which is described elsewhere by McDermott, ibid 107, as an 'important principle'.

[276] Terence Ingman and John Wakefield, 'Equitable Damages Under Lord Cairns' Act' [1981] *The Conveyancer and Property Lawyer* 286, 303-4.

[277] [1982] 2 NSWLR 766, 816 (emphasis added) ('*Hospital Products*'). The breadth of the jurisdiction is supported by Meagher, Gummow and Lehane, above n 259, 635, and by Ian

of Appeal has observed that it should be regarded as settled that monetary compensation may be awarded for breach of any duty deriving historically from equity.[278] Furthermore, as Meagher, Gummow and Lehane note:

> whilst the monetary sum awarded to the plaintiff normally is computed by reference to the profit made by the defendant, this is not invariably so. It can be computed by reference to the detriment suffered by the plaintiff. Nocton v Lord Ashburton,[279]... McKenzie v McDonald,[280] ... and Re Dawson[281] ... all afford illustrations of that proposition.[282]

Indeed, in *Hospital Products*, McLelland J suggested that equitable compensation 'differs from an account of profits in that the loss to the plaintiff rather than the gain to the defendant is the measure of relief.'[283] Michael Tilbury has explained that the purpose of equitable compensation is compensatory, rather than restitutionary, since the object is to restore the plaintiff to his or her previous position, rather than to force the defendant to disgorge a gain.[284] A compensatory approach to the assessment of equitable compensation was recently adopted by the House of Lords.[285]

Unlike Lord Cairns' Act damages, therefore, the remedy of equitable compensation appears to be flexible enough to allow a court of equity in an appropriate case to give effect to an estoppel, in accordance with the minimum equity principle, by awarding payment of compensation calculated to reverse detriment suffered by the representee. It also seems clear that departure from an assumption giving rise to an estoppel is an equitable wrong or a breach of an equitable obligation which gives a court jurisdiction to award compensation.

Davidson, 'The Equitable Remedy of Compensation' (1982) 13 *Melbourne University Law Review* 349.

[278] *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, 301.

[279] [1914] AC 932.

[280] [1927] VLR 134.

[281] [1966] 2 NSWR 211.

[282] Meagher, Gummow and Lehane, above n 259, 634-5.

[283] [1982] 2 NSWLR 766, 816. The same distinction is drawn by Davidson, above n 277, 354.

[284] MJ Tilbury, *Civil Remedies* (vol 1, 1990) 180-1. See also CEF Rickett, 'Equitable Compensation: The Giant Stirs' (1995) 112 *Law Quarterly Review* 27, 28-9

Although Australian and English courts have not traditionally given effect to equitable estoppel by ordering payment of compensation,[286] such a remedy has clearly been granted in Australian cases[287] and has arguably been granted in English[288] and Canadian[289] cases. Moreover, its availability as an estoppel remedy has been supported by two members of the High Court.[290]

Although Marks J was right to suggest in *Clark* that an order for payment of the monetary equivalent of financial loss is a remedy more often granted at common law than in equity,[291] courts of equity clearly do have jurisdiction in estoppel cases to order payment of compensation calculated on a reliance basis. Relief of that nature can be 'reconciled with the preservation of equitable estoppel and the equitable nature of the remedy.'[292] If the courts are to give full effect to the reliance-based approach to relief approved by five members of the

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[285] *Target Holdings Ltd v Redferns* [1995] 3 All ER 785, 793-5.

[286] Cf Davidson, above n 277, 367-8.

[287] Malcolm CJ explicitly gave effect to the equitable estoppel arising in *Adore Pty Ltd v Blenkinsop Nominees Pty Ltd* (Supreme Court of Western Australia, Malcolm CJ, 1 September 1993) by means of an award of equitable compensation, as did Santow J in *Forbes v Australian Yachting Federation Inc* (1996) 131 FLR 241, and both the trial judge and the Full Court of the Supreme Court of Tasmania in *The Public Trustee, as Administrator of the Estate of Williams (dec'd) v Wadley* (Full Court of the Supreme Court of Tasmania, Wright, Crawford and Zeeman JJ, 27 June 1997). The monetary relief granted in *W v G* (1996) 20 Fam LR 49 can only be rationalised as an award of equitable compensation, although it was not described as such. Similarly, the 'damages' awarded in *Raffaele v Raffaele* [1962] WAR 29, 33, on the basis of a contract or 'notional contract' arising by way of proprietary estoppel can only be justified as an award of equitable compensation. An order for specific performance was held to be unsuitable, and the damages were assessed on a restitutionary basis, rather than an expectancy basis in accordance with the 'true substitute' principle, indicating that the Lord Cairns' Act jurisdiction was not invoked.

[288] In *Baker v Baker* (1993) 25 HLR 408, the Court of Appeal gave effect to a proprietary estoppel by awarding payment of 'compensation' calculated on an expectation basis, which could be rationalised as equitable compensation or as Lord Cairns' Act damages in lieu of an injunction.

[289] In *Stiles v Tod Mountain Development Ltd* (1992) 88 DLR (4th) 735, Huddart J gave effect to a proprietary estoppel by awarding payment of 'equitable damages'. McDermott, above n 267, 186, points out that since there was no jurisdiction to award damages under Lord Cairns' Act in those circumstances, the award must be presumed to have been made in the inherent jurisdiction. In *The Queen v Smith* (1980) 113 DLR (3d) 522, the Federal Court of Appeal awarded 'compensation' assessed on a restitutionary basis to give effect to an equitable estoppel.

[290] *Verwayen* (1990) 170 CLR 394, 430-1 (Brennan J), 504 (McHugh J). At least two commentators have also supported the availability of compensation as a means of giving effect to equitable estoppel: Davidson, above n 277, 367-8 and David Jackson, 'Estoppel as a Sword' (Part 2) (1965) 81 *Law Quarterly Review* 223, 247.

[291] [1994] 2 VR 333, 342.

[292] Ibid.

High Court in *Verwayen*, then it is clear that the compensation jurisdiction must be embraced.

(c) Reconciling the earlier authorities

The third problem raised by Marks J is the question whether the reliance-based approach to the minimum equity principle can be reconciled with the approach taken by the English courts in cases such as *Pascoe v Turner*.[293] Marks J pointed out that, in *Pascoe v Turner*, the detriment suffered by the representee consisted of expenditure on a house in reliance on a promise that her former de facto husband had given or would give her the house. Although there was no suggestion that the expenditure was in the least commensurate with the value of the house, the minimum equity accorded the claimant was perfection of the gift of the house by transfer of the fee simple.[294]

It must be conceded that the approach taken by the Court of Appeal in *Pascoe v Turner* cannot be reconciled with the approach laid down by the High Court in *Verwayen*, although it is far from clear that the case would be decided differently in Australia today. The Court of Appeal considered that 'the court must decide what was the minimum equity to do justice'[295] to the defendant, but clearly did not regard the defendant's reliance interest as representing the minimum equity:

> We are satisfied here that the problem of remedy on the facts resolves itself into a choice between two alternatives: should the equity be satisfied by a licence to the defendant to occupy the house for her lifetime or should there be a transfer to her of the fee simple?[296]

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[293] [1979] 2 All ER 945. A similar criticism of the reliance-based approach has been made by Elizabeth Cooke, above n 45, 281 & 285, who argues that the 'meeting of reliance loss only' would be inconsistent with decided cases in which claimants would have had difficulty in proving the value of their reliance. Cooke's criticisms of the reliance-based approach will be discussed in Chapter 8 below.

[294] [1994] 2 VR 333, 342 (Marks J).

[295] [1979] 2 All ER 945, 950.

[296] Ibid 951.

Ultimately, the court concluded that the equity could only be satisfied by 'compelling the plaintiff to give effect to his promise and her expectations.'[297] The court was anxious to ensure that the defendant was assured of quiet enjoyment without interference from the plaintiff, whose conduct indicated that he would evict her by any legal means. It is by no means clear that a reliance-based approach such as that adopted in *Verwayen* would produce a different result. Although the defendant's expenditure on the property was modest, she had relied on the representation over a period of some three years and 'arranged her affairs on the basis that the house and contents belonged to her', expending personal effort as well as capital on the house.[298] On that basis, monetary compensation may not have prevented her from suffering detriment as a result of her reliance on the relevant assumption. Indeed, Heydon and Loughlan point to *Pascoe v Turner* as an example of a case in which 'special circumstances render an expectation remedy more desirable than a detriment remedy'.[299]

Nevertheless, it is clear that the approach taken by the Court of Appeal was quite different from that adopted by the High Court in *Verwayen*. As discussed above, the High Court has taken the minimum equity concept in Australia beyond that which is applied in England. In *Pascoe v Turner*, the minimum equity concept conferred a broad discretion on the court to do justice between the parties. In *Verwayen* the minimum equity concept was refined, so that in Australia it now means the minimum necessary to prevent detriment being suffered by the representee as a result of his or her reliance on the representor's conduct. Even if the results of the earlier English decisions can be reconciled with that approach, it must be conceded that the way in which remedies have been determined cannot.

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[297] Ibid.
[298] Ibid.
[299] Heydon and Loughlan, above n 99.

(d) Future detriment

A final problem with the reliance-based approach is that the detriment suffered by a representee often will not be able to be quantified at the time the court is required to grant relief. Indeed, in *Clark*, Ormiston J suggested that 'proof of detriment must, in most cases, be hypothetical'.[300] There are two separate, but related, problems which can arise: hypothetical detriment and future detriment. First, in many cases the representor will not, up to the time of hearing, have departed from the relevant assumption, but will only have threatened to do so. The relevant question then is: what is the detriment which the court perceives will, hypothetically, be suffered by the representee if the representor is allowed to depart from the representation? Secondly, even if departure from the representation has already occurred, the effect on the representee may be ongoing. The Full Court in *Clark* had to contend with the first of those problems. Since Mr Clark had, up to the time of the Full Court's decision, succeeded in his claim of estoppel, 'the effect of any decision preventing him from relying on the pleaded estoppel may only finally be known if an appellate court reverses that finding of the trial judge'.[301]

As Ormiston J observed, the need to consider detriment which is purely hypothetical was implicitly recognised in Justice Dixon's statement in *Grundt v Great Boulder Pty Gold Mines Ltd* that 'the real detriment or harm from which the law seeks to give protection is that which *would* flow from the change of position if the assumption were deserted that led to it'.[302] Justice Ormiston's approach to resolving the problem of hypothetical detriment was to have regard to what 'the court perceives to be the likely detrimental consequences of proved acts or inaction in reliance on the relevant assumption.'[303] He rightly favoured a 'generous application' of the reliance-based approach in those circumstances 'in the sense that it is not always obvious that the estimated detriment can be

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[300] [1994] 2 VR 333, 383.
[301] Ibid 358.
[302] (1937) 59 CLR 641, 674 (emphasis added), cited by Ormiston J at [1994] 2 VR 333, 356.
[303] [1994] 2 VR 333, 383.

satisfied merely by an order for costs or some other monetary sum by way of compensation'.[304]

The broader question which this problem poses is, if proof of detriment suffered by the representee as a result of his or her reliance will often be hypothetical, does that suggest that reliance provides an unhelpful basis on which to determine relief? One answer is that, while some cases involve purely hypothetical detriment which is impossible to quantify, others, such as *Re Neal* discussed above, involve past detriment consisting purely of wasted expenditure which is very easy to quantify.[305] If the purpose of equitable estoppel is to protect against the consequences of detrimental reliance, and not to hold parties to the expectations which they have created, then a reliance-based approach to relief should be retained. In those cases where detriment is wholly or partly hypothetical and cannot be quantified, the equity raised by the representor's conduct and the representee's reliance will only be satisfied by holding the representor to the truth of the assumption.

E. *The Future of the Reliance-Based Approach*

The adoption of a reliance-based approach to relief is clearly a significant step in the development of equitable estoppel. The above discussion traced the evolution of equitable estoppel relief from its origins in the making good of representations, to a concern with satisfying equities, and finally to a goal of fulfilling only the minimum equity. In *Verwayen* the High Court defined the concept of a 'minimum equity', doing so by reference to one of the purposes of estoppel, which is to protect reasonable reliance on the conduct of others. The adoption of a reliance-based approach to satisfying an equity arising by way of estoppel provides a more certain measure of such an equity, while retaining the flexibility which is necessary to do justice between the parties in each case. Perhaps most importantly, the adoption of a reliance-based approach to the determination of relief brings the remedy into line with one of the purposes of

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[304] Ibid.

[305] See above, text accompanying nn 203-205

equitable estoppel, which is to provide protection against the detrimental consequences of reliance on the conduct of others.

The above examination of the post-*Verwayen* cases provides some indication of the way in which the *Verwayen* approach to relief is being implemented. Three conclusions can be drawn from that examination. First, it seems that, with some notable exceptions, such as Justice Ormiston's judgment in *Clark* and the majority judgments in *Public Trustee v Wadley*, there is still a tendency to see equitable estoppel as having a preclusionary operation. To adapt the words of Fuller and Perdue, expectation relief flows so naturally from the language of estoppel that in most cases it is granted without any discussion at all.[306] Although it seems that more attention needs to be paid to the possibility of a reliance-based remedy in each case, it does seem that in most cases expectancy relief will be the only way of satisfying the equity. It seems from the cases decided since *Verwayen* that the detriment caused by the representee's reliance will often be difficult to quantify. That may be because the detriment has been incurred over a long period of time, because it is of such a nature that it is not quantifiable, because it is ongoing, or because it is has not yet been incurred. In each of those cases, provided the court is satisfied that the detriment is or will be substantial, expectation relief must be granted.

The second conclusion to be drawn from the post-*Verwayen* cases is that, if the reliance-based approach to relief is to succeed, the remedy of equitable compensation will need to be embraced by the courts. It is clear that courts of equity have jurisdiction to order payment of compensation in estoppel cases. It is equally clear that, in those cases where the detriment is quantifiable, the remedy of compensation provides the best means for a court to 'do what is required in order to avoid detriment to the party who has relied on the assumption induced by the party estopped, but no more.'[307]

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[306] Fuller and Perdue, above n 13, 407.

[307] *Verwayen* (1990) 170 CLR 394, 412 (Mason CJ).

Finally, the extent of the High Court's break with the past in *Verwayen* should be acknowledged. The adoption of a reliance-based approach to relief by five members of the High Court in *Verwayen* significantly altered the principles governing the way in which courts give effect to equitable estoppel. As the above analysis of the cases has shown, that doctrinal shift appears to have had little impact on the results of the cases decided since. If the approach adopted in *Verwayen* is to be applied more widely and more strictly, then the abandonment of the expectation-based and undefined-equities-based approaches will need to be articulated more clearly. Although it may be possible to reconcile the new approach with the results of earlier cases in which relief was determined on a different footing, it would be quite artificial to do so. The next step in the implementation of the reliance-based approach to relief in equitable estoppel cases should be to recognise the shift that was effected in *Verwayen*.

IV. A UNIFIED ESTOPPEL

The major difference between the supporters of a unified estoppel in *Verwayen* arose in relation to the nature of the relief which should be provided by the unified doctrine. The essence of that difference is the question whether the unified doctrine should operate in essentially the same way as equitable estoppel now operates, providing reliance-based relief, or should be based on common law estoppel, providing a *prima facie* right to expectation-based relief.

Mason CJ in *Verwayen* favoured a unified doctrine that operates in much the same way as the reliance-based approach to equitable estoppel relief outlined above. According to the Chief Justice, a central element of the unified doctrine of estoppel is that 'there must be a proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and unjust to insist upon a disproportionate making good of the assumption.'[308]

The Chief Justice made it clear that 'doing justice' in this context means protecting only against the representee's reliance loss. In distinguishing between

detriment in the broad sense (detriment flowing from the denial of the correctness of the assumption induced by the representor) and detriment in the narrow sense (detriment flowing from the representee's change of position in reliance on that assumption), Mason CJ made it clear that 'the detriment against which the law protects is that which flows from reliance upon the deserted assumption'.[309]

The unified estoppel proposed by Mason CJ, therefore, provides a remedy which is essentially compensatory in nature. Its adoption would provide us with a substantive doctrine of estoppel which would provide compensation for harm suffered as a result of reliance on representations of fact. Since it would operate as a cause of action, the doctrine would be more widely available than the present common law estoppel,[310] and its remedial effect would be dramatically different. This change in the law gives rise to two questions of practical importance. The first question is whether this new doctrine, which provides a compensatory remedy for the consequences of reliance on false statements of fact, will overlap with causes of action in tort for misrepresentation, and with the remedies available under statute for loss suffered as a result of misleading or deceptive conduct.[311] The answer to that question is that a unified estoppel would not greatly overlap with the remedies otherwise available for misrepresentation because a unified estoppel would not provide compensation for all harm suffered as a result of reliance on representations of fact. It would only provide a remedy where harm is suffered *as a result of the representor's departure* from the relevant assumption in question. The remedy provided by a unified estoppel would thus complement the remedies available in tort and under statute,

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[308] (1990) 170 CLR 394, 413.

[309] (1990) 170 CLR 394, 415-6: 'So while detriment in broad sense is required to found an estoppel, ... the law provides a remedy which will often be closer in scope to the detriment suffered in the narrow sense.'

[310] The circumstances in which common law estoppel can be utilised by a representee are limited to those situations in which it can be used as a defence to an action brought by the representor or those in which it happens to provide the factual foundation of a cause of action against the representor.

[311] Misleading or deceptive conduct is prohibited by the Trade Practices Act 1974 (Cth), s 52; Fair Trading Act 1987 (NSW), s 42; Fair Trading Act 1989 (Qld), s 38; Fair Trading Act 1987 (SA), s 56; Fair Trading Act 1990 (Tas), s 14; Fair Trading Act 1985 (Vic), s 11; Fair Trading Act 1987 (WA), s 10; Consumer Affairs and Fair Trading Act 1990 (NT), s 42; Fair Trading Act 1992 (ACT), s 12. Damages are recoverable by a person who suffers loss 'by' such conduct

providing an additional cause of action in circumstances in which harm is suffered as a result of a change of position on the faith of a representation of fact, which proves detrimental when the representor subsequently acts inconsistently with that representation.

A more important question is the impact of a unified estoppel in those areas of the law in which the preclusionary effect of estoppel is taken for granted. The law of agency, for example, would be dramatically affected if the principle of agency by estoppel were regarded as part of a unified estoppel. That is, if a person dealing with an agent who had been held out as having certain authority could not hold the principal to that representation and enforce the contract made by the agent, but instead had a cause of action against the principal/representor for compensatory relief. This would clearly introduce an undesirable measure of uncertainty into commercial dealings. A similar problem would arise in circumstances in which a contract is created by estoppel. A contract is said to be formed if a person (A) conducts himself or herself in such a way that a reasonable person would believe that A was assenting to the terms of a contract, and another party (B) contracts with A on that basis.[312] This principle is either based on an objective theory of contract formation, or on estoppel by conduct.[313] If it were regarded as a manifestation of estoppel by conduct, then the law relating to contract formation would be greatly complicated by the application of a unified estoppel with a compensatory approach to relief. The better view of the law is, however, that the principle mentioned above is based on an objective approach to contract formation, rather than a principle of estoppel.[314] The problem can, therefore, be neatly avoided. The difficulties relating to agency by estoppel cannot be so easily overcome, because it is well accepted that the principles of ostensible authority and agency arising by 'holding out' are based on estoppel by

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from the person who engages in it: Trade Practices Act 1974 (Cth), s 82 and state Fair Trading Act equivalents.

[312] *Smith v Hughes* (1871) LR 6 QB 597, 607 (Blackburn J).

[313] *Taylor v Johnson* (1983) 151 CLR 422, 428 (Mason ACJ, Murphy and Deane JJ).

[314] As Mason ACJ, Murphy and Deane JJ observed in *Taylor v Johonson*, ibid 429, 'the clear trend in decided cases and academic writings has been to leave the objective theory in command of the field.'

representation.[315] The answer may ultimately lie in the abandonment of the notion that ostensible authority and analogous principles are based on estoppel, or in regarding them as a preclusionary form of estoppel which is unique to the law of agency.[316]

In contrast to the approach adopted by Mason CJ, the other supporters of a unified estoppel in *Verwayen*, Deane and Gaudron JJ, saw the unified doctrine as operating primarily to fulfil expectations. The influence of the preclusionary common law doctrine is clearly more evident in their judgments than that of the Chief Justice. As discussed above, both Deane and Gaudron JJ saw the unified estoppel as providing a *prima facie* right to expectation relief, but they differed in relation to the circumstance in which a court should substitute other relief. On Justice Gaudron's view, the *prima facie* right could be lost if the representor could prove that another remedy would clearly compensate the representee for all of the detriment suffered.[317] Deane J, on the other hand, would focus on the position of the representor: he would overturn the *prima facie* right only if to do so would be 'inequitably harsh'[318] for the representor.[319]

The difference of opinion as to remedy is a major obstacle facing proponents of a unified estoppel, but can be resolved by reference to what is thought to be the essential purpose of the doctrine. If the object of the unified doctrine is to provide protection against harm resulting from reliance, then the remedy proposed by Mason CJ is more apt to fulfil that purpose. The detriment itself must be the focus of the court's inquiry, and the starting point in the determination of relief. If, on the other hand, the guiding objective of estoppel is the prevention of

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[315] See, eg: *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 498 (Pearson LJ) and 503-4 (Diplock LJ) and DW Greig and NA Gunningham, *Commercial Law* (3rd ed, 1988) 15.

[316] This may in turn lead to difficult problems of classification. If a distinction were to be drawn between estoppel by conduct and agency by estoppel, then cases such as *Spiro v Lintern* [1973] 3 All ER 319 may be difficult to categorise.

[317] (1990) 170 CLR 394, 487.

[318] Ibid 443.

[319] Ibid 445-6. This approach to a unified estoppel could also create problems in the area of agency and contract formation. It could no longer be said that an agency is created or a contract formed by estoppel, since it would be open to a representor to argue in a particular case that such a result would be inequitably harsh.

unconscionable conduct, then the relief granted ought to be consistent with that objective. The proposals outlined by Paul Finn formed an approach to relief which focuses on the conscience of the representor, essentially determining the extent of the relief by the blameworthiness of the representor's conduct.[320] Finally, if the object of a unified estoppel is the enforcement of promises, both warranties as to states of affairs and promises relating to future conduct, then the approach favoured by Deane J would be most apt to fulfil that purpose. The representor would be required to make good the relevant assumption unless to do so would cause injustice to the representor.

V. CONCLUSIONS

The question of remedy is of considerable importance to a discussion of the philosophy of estoppel, because giving effect to an estoppel requires a clear choice between the contending philosophies. This chapter has shown that the three different philosophies of estoppel, based on reliance, promise and conscience, match neatly the three different approaches to determining relief to give effect to estoppel, which can be described as reliance-based, expectation-based and conscience-based approaches. In none of the three different types of estoppel discussed above is the question of remedy clearly settled, although the order of discussion of the three different estoppels in this chapter could be said to represent a spectrum from the doctrine with the most settled approach to relief, common law estoppel, to that with the least settled, the unified estoppel.

The question of relief is well settled at common law, although those rare cases in which the value of the representee's expectation is out of proportion to the detriment resulting from his or her reliance show that the inflexibility of the doctrine leads to unjust results at the margins. Cases such as *Avon County Council v Howlett* suggest that the simplicity of common law estoppel masks a fundamental flaw, which is that its preclusionary operation is inconsistent with what many see as its fundamental purpose, which is to prevent harm resulting from reliance. It seems that only a substantive doctrine can fulfil that purpose

[320] See above nn 23-26 and accompanying text.

effectively. The need for flexibility in the remedy provided by common law estoppel provides a powerful incentive for a merger of that doctrine with its equitable counterpart.

It is only very recently, on the other hand, that a clear basis for the determination of relief to give effect to the equitable doctrine has been outlined. Although the High Court has laid down clear principles for the determination of relief, the cases decided since *Verwayen* show that a number of practical issues need to be resolved before those principles can be implemented effectively. Those issues are: first, the way in which the courts should give effect to an estoppel raised defensively; secondly, the circumstances in which the courts should grant expectation-based relief instead of relief in the preferred reliance measure; thirdly, how the courts should deal with the problem of future detriment; fourthly, whether the courts should be adopting an approach to relief that can be reconciled with the pre-*Verwayen* cases; and, fifthly, whether the courts can give effect to the minimum equity principle in an appropriate case by an award of equitable compensation, which is not traditionally recognised as a means by which to give effect to an estoppel.

The above discussion has offered a means by which each of those questions can be resolved. First, both principle and authority indicate that the courts should give effect to all equitable estoppels in the same way, whether they are raised aggressively or defensively. Secondly, even under a strictly reliance-based approach to relief, the courts should still grant expectation relief in two sets of circumstances. The courts should grant expectation relief where the relevant detriment cannot be quantified, because it has been incurred over a long period of time, because it is of such a nature that it is not quantifiable, because it is ongoing, or because the potential for significant future detriment remains at the time of judgment. The courts should also grant expectation relief in cases where the value of the representee's reliance loss exceeds the value of the expectancy. Thirdly, it seems that the only way in which the courts can deal with cases in which the potential for substantial future detriment remains at the time of judgment is to grant expectation relief. Fourthly, the reliance-based approach may

be more easily understood if it is recognised as a newly principled approach to giving effect to equitable estoppel. Fifthly, it seems clear that equitable compensation is a remedy which is available in equitable estoppel cases, and which will need to be embraced if the reliance-based approach is to be more consistently applied.

Although the unified doctrines proposed in recent judgments draw on hundreds of years of authority, the notion of a substantive doctrine of estoppel which operates both at common law and in equity is new. Accordingly, the question of remedy in a unified doctrine is a live question which should be answered by reference to the philosophy of the doctrine. This thesis suggests that the fundamental purpose of all estoppels by conduct is to protect against the detrimental consequences of reliance on the conduct of others. A reliance-based approach to relief would be most consistent with that purpose. Apart from the philosophy of the doctrine, there are other reasons to prefer a reliance-based approach to remedy in a unified estoppel. This chapter has shown that recent authority supports a reliance-based approach to relief in equitable estoppel. As the next chapter will show, there are also sound reasons of principle and policy favouring a reliance-based approach over expectation-based or conscience-based approaches.

Chapter 8

THE RELIANCE BASIS OF ESTOPPELS BY CONDUCT*

Having examined in detail the elements required to establish an estoppel, and the way in which the courts give effect to the various different types of estoppel, it is possible to return to the central questions posed by this thesis concerning the fundamental purpose underlying estoppel by conduct. This chapter is essentially concerned with evaluating the descriptive and normative claims of promise, conscience and reliance-based theories of estoppel. In the light of the detailed examination of the doctrinal requirements in chapters 3-7 above, this chapter will attempt to answer the questions of what is, and what should be, the essential purpose of estoppel by conduct.

I. THE NEED FOR A BASAL PURPOSE

Before examining in detail the relative merits of the various philosophies of estoppel, it is necessary to return to the threshold question whether there is any real need to choose between them, or at least to emphasise one philosophy at the expense of the others as representing the basal purpose of estoppel by conduct. Such a choice is needed for two reasons: first, to provide a basis on which to resolve the outstanding questions in estoppel and, secondly, in order to situate the doctrines of estoppel by conduct within the law of obligations. The identification of the 'foundational norm'[1] of estoppel would provide a basis on which to settle the outstanding questions, and would help us to understand the conceptual foundations of estoppel by conduct, and consequently its place within the law of obligations.

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* Substantial parts of this chapter have been published in 'Situating Equitable Estoppel Within the Law of Obligations' (1997) 19 *Sydney Law Review* 32-64.

[1] As discussed in Chapter 2, the need to identify a 'foundational norm' underlying tort law was articulated by Richard Wright, 'Right, Justice and Tort Law' in David Owen (ed), *Philospophical Foundations of Tort Law* (1995) 159, 160.

A. *Unresolved Questions*

The most pressing reason to take the question of a basal purpose of estoppel by conduct seriously is that it provides a means by which to resolve several fundamental questions about the nature and operation of common law and equitable estoppel. As Fuller and Perdue pointed out in relation to promissory estoppel in the United States almost sixty years ago, 'by leaving the matter of the controlling motive in this ambiguous state, we have unsettled questions of very considerable practical importance.'[2] Since the controlling motive of estoppel by conduct is still in an ambiguous state in Australia, five principal areas of conflict between the competing motives or philosophies of estoppel remain.

1. The Threshold Requirement

The first question, which remains unresolved in both common law and equitable estoppel, is the nature of the threshold conduct required to establish an estoppel. Chapter 3 of this thesis showed that, although the High Court in *Legione v Hateley* required a clear and unequivocal statement as a foundation of equitable estoppel, in more recent decisions the courts seem to be adopting a rather less strict approach to the threshold question, as they move away from a concern with promises and representations and towards the notion of an induced assumption. It is clear that the threshold question is closely connected with the requirement of reasonable reliance, and particularly with the requirement that it must have been reasonable for the representee to adopt the assumption on which the estoppel is based. A stricter threshold requirement obviates the need to consider the reasonableness of adopting an assumption as a result of that promise or representation. The courts are faced, then, with a choice between a strict threshold requirement and an emphasis on reasonableness of reliance.

That choice between a strict threshold requirement and an emphasis on reasonableness is closely connected with the philosophy of estoppel. If one

[2] LL Fuller and William Perdue, 'The Reliance Interest in Contract Damages: 1' (1936) 46 *Yale Law Journal* 52, 69.

regards estoppel as essentially concerned with the enforcement of promises, then the promise itself must be the primary concern of the doctrine. A strict threshold requirement provides a means by which the nature of the promise can be emphasised. It then becomes important to scrutinise the extent to which the representor committed himself or herself to a particular course of action or to the existence of a particular state of affairs. If, on the other hand, estoppel by conduct is essentially concerned with reliance, then the threshold conduct on which the estoppel is based becomes less important. The court is then primarily concerned with the position of the representee, and the circumstances of his or her reliance. Consideration of the reasonableness of the representee's adoption of the assumption clearly encompasses questions of the type of conduct which founded the assumption. If the reasonableness of the representee's reliance is to be closely scrutinised, then it is unnecessary to characterise the nature of the conduct on which the assumption was based. The balance to be achieved between the threshold requirement and the reasonableness requirement is, therefore, a practical question which can be resolved by reference to the philosophy of estoppel. The essential choice here is between a promise-based doctrine, which is primarily concerned with the nature of a representor's conduct, and a reliance-based doctrine, which is fundamentally concerned with the reasonableness of the assumption adopted by the representee.

2. The Reasonableness Question

The second question that needs to be resolved in both the common law and equitable doctrines is the role and formulation of the reasonableness requirement. Chapter 5 of this thesis showed that reasonableness is increasingly being seen as the principal means by which the availability of both common law and equitable estoppel is limited. The reasonableness requirement is capable of doing the work that might otherwise be done by a strict threshold requirement. It is also capable of doing the work that might otherwise be done by a requirement that it must be unconscionable to depart from the relevant assumption.

As chapter 5 of this thesis showed, the principal unanswered question in relation to reasonableness is the choice between a focus on reasonableness of reliance and a reasonable expectation of reliance. The former is more consistent with a reliance-based, representee-focussed doctrine, while the latter is more consistent with a conscience-based, representor-focussed doctrine. As Chapters 5 and 6 showed, both questions appear to be relevant, although the role of the latter question has not yet been clarified. It seems that the reasonableness of reliance question is favoured as the basic test applied in all cases in which an estoppel is claimed to arise. Chapter 6 argued that in cases of estoppel by silence the reasonableness of reliance test should be supplemented by consideration of the question whether the representor should have reasonably expected reliance, and should, therefore, have taken steps to caution the representee against such reliance.

It is clearly necessary to strike a balance between these two different approaches to reasonableness. They can be reconciled in the way described above, but the courts must favour one approach over the other as the principal means by which estoppel by conduct is limited. That choice can be made by reference to the philosophy of estoppel. The essential question here is whether estoppels by conduct are conscience-based, and essentially concerned with the position of the representor (justifying the reasonable expectation of reliance test as the principal means by which the application of estoppel is limited), or whether they are reliance-based, and primarily concerned with the position of the representee (justifying the reasonableness of reliance test as the principal means by which the application of estoppel is limited).

3. The Role of Unconscionability

One of the most difficult unresolved questions in estoppel by conduct is the role that is and should be played by the concept of unconscionability. While it is arguable according to some formulations that notions of unconscionability have no role to play in estoppel by conduct, it has also been observed that

unconscionability is the touchstone for estoppel by conduct.[3] It has variously been suggested that unconscionability is the only relevant question that a court must consider in an estoppel case,[4] that unconscionability is one of the elements that must be made out to establish an estoppel,[5] that questions of causation can be tested by reference to unconscionability,[6] and that the remedy provided to give effect to the estoppel is shaped by reference to unconscionability.[7] As Chapter 6 has shown, the notion that an estoppel should be established by reference to a broad test of unconscionability, even as only one of the elements that needs to be established, does not sit comfortably with the approach taken in the common law estoppel cases. This provides a formidable barrier to the unification of the common law and equitable doctrines.

The role of unconscionability in estoppel by conduct can be determined by reference to the essential purpose of estoppel by conduct. If estoppel by conduct is essentially concerned with preventing unconscionable conduct, then the representor's conscience should play a prominent role in the determination of questions of both liability and remedy. If, on the other hand, the principal purpose of estoppel by conduct is to prevent detriment resulting from reliance on the conduct of others, then the representor's conscience has a limited role to play in the operation of these doctrines.

4. The Unification of Estoppels by Conduct

One of the most significant differences of judicial opinion in relation to estoppel is the question of unification: whether common law and equitable estoppel should be unified to form a single doctrine of estoppel by conduct. While there is considerable support for the maintenance of separate doctrines, there are

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[3] JW Carter and DJ Harland, *Contract Law in Australia* (3rd ed, 1996) 133.
[4] *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133, 155.
[5] Eg: *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582, 585 (Kirby P): 'for equitable estoppel to operate, there must relevantly be [an assumption, inducement and detrimental reliance] in circumstances where departure from the assumption by the defendant would be unconscionable.'
[6] *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] 1 QB 84, 104 (Robert Goff J at first instance).
[7] Eg: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 419 (Brennan J).

significant practical reasons for amalgamating them. First, unification would resolve the difficult question of demarcation between assumptions relating to existing facts and assumptions relating to existing legal rights. Secondly, unification would allow flexibility to be exercised in giving effect to an estoppel arising from an assumption of fact, preventing injustice in those cases in which a representee's expectation is disproportionate to his or her reliance. Thirdly, unification would greatly simplify what is an unnecessarily complex area of the law. If one accepts the need for unification, then a further question arises of the basis on which unification should take place. The differences between the unified doctrines proposed by Mason CJ and Deane J show that there is no obvious form for the unified doctrine to take. It could be shaped primarily by reference to the equitable doctrine, as Mason CJ has proposed, or primarily by reference to the common law doctrine, as Deane J has proposed.

As with the other unresolved issues, a consideration of the philosophy of estoppel can provide an answer to the question of unification. If the common law and equitable doctrines serve the same fundamental purpose, then there is little justification for two separate sets of principles. As Chapters 3-7 of this thesis have shown, there are traces of all three purposes, fulfilling promises, preventing unconscionable conduct and preventing harm resulting from reliance, in both the common law and equitable doctrines. If one of those purposes could be identified as the basal purpose of both the common law and equitable doctrines, then that essential purpose would provide both a reason for unification, and a basis upon which unification could take place. The unified doctrine could, and should, be shaped by reference to that unifying purpose.

5. The Question of Remedy

The final unresolved question relates to the way in which the courts should give effect to the equitable doctrine of estoppel, and a unified doctrine, if such a doctrine was to be recognised. Chapter 7 of this thesis showed that it is possible to approach the question of remedy on a promise basis, a conscience basis and a

reliance basis. The High Court in *Commonwealth v Verwayen*[8] was divided on the question whether the effect of an equitable estoppel was, *prima facie*, to make good the relevant assumption or fulfil the relevant promise, or whether the court should set out to fashion relief which has the effect of preventing or reversing detriment resulting from reliance on the relevant assumption. A similar remedial question arises in relation to a unified doctrine: again, the relevant question is whether the doctrine should operate to make good the relevant assumption where possible, or whether the court should seek from the outset to grant relief that is proportional to the detriment suffered by the representee.

As discussed in Chapter 7, these remedial questions can also be resolved by reference to the philosophy of estoppel by conduct. If equitable estoppel and a unified estoppel are fundamentally concerned with the enforcement of promises, then the courts should be concerned to give effect to that purpose in the granting of remedies. The *prima facie* effect of the estoppel should be to make good the relevant promise or representation. If the purpose of estoppel by conduct is to prevent harm resulting from reliance on the conduct of others, then a reliance-based approach to remedy is more appropriate. The courts should then, if possible, grant a remedy that has the effect of preventing or reversing detriment resulting from reliance. If, on the other hand, the purpose of estoppel by conduct is to prevent unconscionable conduct, then it could be argued that the conscience-based approach to relief outlined in Chapter 7 should be adopted.

B. *Situating Estoppel by Conduct within the Law of Obligations*

The second reason to identify the basal purpose of estoppel by conduct is that it would help us to locate estoppel by conduct within the law of obligations, and to understand its relationship to contract and tort. The need to develop a coherent taxonomy or map of the law of obligations has been identified by Nicholas McBride and Peter Birks.[9] Locating, and debating the location of, a

[8] (1990) 170 CLR 394 ('*Verwayen*'), discussed in Chapter 7 above.
[9] Nicholas McBride, 'A Fifth Common Law Obligation' (1994) 14 *Legal Studies* 35, 35-6; Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *University of*

particular doctrine within the law of obligations helps us to understand the nature of that doctrine, and its relationship with other parts of the law. In mapping the law of obligations we must, as far as possible, refuse to accept the existence of anomalous doctrines which appear to stand outside a coherent framework. The more anomalies we accept, the more difficult it becomes to identify and to deal with duplication and inconsistencies in our legal system.[10]

According to Fowler, the relations between certain words:

> plainly show that the language has not been neatly constructed by a master builder who could create each part to do the exact work required of it, neither overlapped nor overlapping; far from that, its parts have had to grow as they could.[11]

Similarly the relations between estoppel, contract, tort and restitution show that the law of obligations has not been neatly constructed. The categories are overlapping, the work to be performed by each remains undefined and each part has, according to the fashions of the day, expanded as it could. Examining the fundamental purpose and basis of operation of estoppel by conduct helps us to locate estoppel within a coherent taxonomy of the law of obligations, allowing us to resist the temptation to label estoppels as anomalous doctrines which have no coherent rationale or mode of operation and which, accordingly, defy classification.

Common law estoppel operates merely as an adjunct to the substantive parts of the law of obligations. The effect of common law estoppel in most cases is simply to prevent a person from denying certain facts, and thereby establish a state of affairs by reference to which the substantive rights of the parties are determined. Even where common law estoppel operates in relation to an

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Western Australia Law Review 1, 3-7. A book of essays devoted to the topic has recently been published: Peter Birks (ed), *The Classification of Obligations* (1997).

[10] See Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *University of Western Australia Law Review* 1, 7.

[11] HW Fowler and Sir Ernest Gowers, *A Dictionary of Modern English Usage* (2nd ed, 1965)

assumption of rights, its effect is simply to prevent the representor from denying the existence of such rights. Thus, common law estoppel may allow a cause of action to be established in contract, tort or restitution which could not otherwise be established, or it may operate as a defence by preventing a cause of action from being established which, but for the estoppel, could be established. Common law estoppel is not, therefore, an independent source of rights which needs to be situated on a map of the law of obligations.

On the other hand, equitable estoppel and the unified doctrines applied in the High Court do operate as independent sources of rights. Unlike common law estoppel, they are not limited to assumptions of existing fact and can operate in relation to assumptions as to a representor's future conduct. As argued in Chapter 1, equitable and unified estoppels thus provide causes of action in themselves and operate as independent sources of substantive rights. Accordingly, equitable estoppels and unified estoppels cannot operate as mere evidentiary principles.

Both equitable estoppel and the proposed unified estoppels have developed in such a way that they cannot readily be situated on a map of the law of obligations. The fundamental question that must be resolved is whether they should be seen as part of the law of contract, as part of the law of wrongs, or as an anomalous category, which is neither contract nor wrong. That question will be taken up later in this chapter after a review of the contending theories.

II. A REVIEW OF THE CONTENDING THEORIES

A. *Promise Theory*

In essence, the promise theory of estoppel holds that estoppel by conduct is fundamentally concerned with the enforcement of promises and should, therefore, be seen as, or adapted to become, part of the law of contract. As

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discussed in Chapter 2, promise theory can be applied to common law estoppel and provides some useful insights into its operation, despite the fact that it is limited to assumptions of existing fact. Since equitable estoppel can operate in relation to promises relating to a person's future conduct, however, it is more readily explicable on the basis of promise theory than its common law counterpart. Accordingly, the following discussion concentrates primarily on the equitable doctrine and, by implication, a unified doctrine that operates in similar circumstances.

As outlined in Chapter 2, different varieties of promise theory have been advanced by commentators in Australia,[12] the United States[13] and England.[14] This section will critically examine three different arguments made by promise theorists. The first question to be addressed is whether, as Edward Yorio and Steve Thel have claimed of promissory estoppel in the United States,[15] estoppel by conduct in Australia is essentially concerned with the enforcement of promises. Although I will argue that the Australian doctrines of estoppel are not based on promise, it is an important question to ask, since it helps us to address the broader question whether estoppel is essentially contractual in nature. The second and third parts of this section will deal with proposals for changes to contractual principles which would have the effect of bringing equitable estoppel cases within the law of contract.

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[12] Barbara Mescher, 'Promise Enforcement by Common Law or Equity?' (1990) 64 *Australian Law Journal* 536-566.

[13] Edward Yorio and Steve Thel, 'The Promissory Basis of Section 90' (1991) 101 *Yale Law Journal* 111; Randy Barnett, 'A Consent Theory of Contract' (1986) 86 *Columbia Law Review* 269; Daniel Farber and John Matheson, 'Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"' (1985) 52 *University of Chicago Law Review* 903.

[14] PS Atiyah, *An Introduction to the Law of Contract* (5th ed, 1995) 137-41; Birks, above n 10, 60-64.

[15] Yorio and Thel, above n 13.

1. Is Estoppel by Conduct Based on Promise?

(a) Equitable estoppel

Despite the occasional confusion in the cases,[16] the doctrine of equitable estoppel operating in Australia is regarded as quite separate from the law of contract.[17] There have been numerous statements by members of the High Court in recent years seeking to distance equitable estoppel from contract.[18] The only connections between equitable estoppel and contract are: first, that liability in estoppel can, like contractual liability, arise from a promise; and, secondly, that the remedies provided by equitable estoppel and contract mirror each other in terms of purpose and effect. Although it seems after *Verwayen* that the purpose of equitable estoppel relief is to protect the representee's reliance interest, the relief granted to give effect to an estoppel will very often have the effect of protecting the representee's expectation interest.[19] Conversely, although the purpose of contractual relief is to protect the promisee's expectation interest, the reliance interest will occasionally be protected instead.[20]

As discussed in Chapter 2, Yorio and Thel have conducted a detailed examination of the decisions on promissory estoppel in the United States which, they argue, reveals that the true basis of both liability and remedy under that doctrine is promise, rather than reliance.[21] The relevant question for this thesis is whether a similar argument can be made in relation to equitable estoppel in Australia. Turning first to the question of liability, or the establishment of an estoppel, Yorio and Thel argue that the courts in the United States distinguish enforceable promises from unenforceable promises under s

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[16] See Chapter 1 above.
[17] See *Beaton v McDivitt* (1987) 13 NSWLR 162, 170 (Kirby P), 182 (McHugh J).
[18] See, for example, *Waltons Stores (Interstate) Pty Ltd v Maher* (1988) 164 CLR 387, 400-1 (Mason CJ and Wilson J), 423-7 (Brennan J); *Verwayen* (1990) 170 CLR 394, 439-40 (Deane J), 453 (Dawson J), 501 (McHugh J).
[19] See Chapter 7 above.
[20] See, eg, *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377; *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64.
[21] Yorio and Thel, above n 13.

90 by reference to the quality of the promisor's commitment.[22] The US courts do not always require the promise to induce action or forbearance, and do not always insist that the promisee suffers detriment as a result of reliance on the promise.[23]

While the Australian cases may also appear superficially to be concerned with enforcing promises, close examination shows that the basis of liability in Australia is clearly reliance, rather than promise. First, it is clear that the requirement of detrimental reliance by the representee is a central element of the Australian doctrine. Chapter 5 showed that Justice Dixon's statement that detrimental reliance was an indispensable condition of estoppel has been extremely influential.[24] The Australian courts have adopted a very strict approach to the requirement for the purposes of both common law and equitable estoppel. Although there have been occasional lapses, the Australian courts have generally been consistent in denying recovery where the representee cannot point to a detrimental change of position in reliance on the relevant assumption.[25]

Perhaps the clearest indication that equitable estoppel in Australia is not promise-based is the fact that a promise is not required to establish an equitable estoppel. This aspect of equitable estoppel was considered in Chapter 3, which showed that both common law and equitable estoppel appear to require an induced assumption, rather than any particular type of conduct on the part of the representor. That approach was contrasted with the principle applied in the United States, that an estoppel as to future conduct must be founded on a promise, which requires a commitment to act in a certain way. Several different types of conduct can be held to induce the adoption of an assumption, and thus can found an equitable estoppel in Australia. An equitable estoppel can be founded on a course of conduct that indicates that the representor will act in a

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[22] Ibid 167.
[23] Ibid. Yorio and Thel do admit that there are still 'many cases that adduce reliance as a reason for enforcing the promise'.
[24] *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674.
[25] See Chapter 5 above.

certain way or that the parties have certain rights,[26] a representation as to the representor's intention to act in a certain way or as to the existing legal rights of the parties,[27] or even silence in certain circumstances.[28]

Although some courts in the United States have interpreted the notion of a promise quite broadly, it seems clear that the requirement of an induced assumption is potentially broader, since it abandons the notion of a commitment by the representor to a future course of action or to the truth of a representation. Accordingly, estoppels by conduct in Australia are based on a weaker threshold of conduct by the representor, which suggests that the focus of the doctrines is elsewhere. This chapter will show that the focus is indeed elsewhere, namely on the action taken by the representee on the faith of the relevant assumption, and the consequences of that action for the representee.

Yorio and Thel also argue that remedies in promissory estoppel cases are based on promise, rather than reliance. They point to a number of surveys which show that the US courts routinely give effect to promissory estoppel by enforcing promises, ordering either specific performance or payment of expectation damages.[29] Yorio and Thel show that, even where reliance damages are quantifiable, courts still opt for expectation relief. It is only in rare cases where no clear promise has been made, or expectation damages are difficult to determine, that reliance damages are awarded.[30]

The examination of the recent Australian cases in Chapter 7 showed a similarly overwhelming preference for expectation relief.[31] That survey covered 30 reported decisions since *Verwayen* in which relief was granted, and showed that expectation relief was granted in each of those cases. Chapter 7 provided three

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[26] See, eg, *S & E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122 ALR 637.
[27] See, eg, *Verwayen* (1990) 170 CLR 394.
[28] See, eg, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.
[29] Yorio and Thel, above n 13, 130-2.
[30] Ibid 151.
[31] Elizabeth Cooke, 'Estoppel and the Protection of Expectations' (1997) 17 *Legal Studies* 258, 258, has also observed that in applying equitable estoppel the English courts have 'with very few exceptions, protected the claimant's expectation interest, and that the courts' preference and tendency has been to protect expectations in full so far as is possible'.

reasons why the preference for expectation relief should not lead to the conclusion that equitable estoppel in Australia is promise-based. First, equitable estoppel in Australia is not seen as part of the law of contract. As discussed above, Australian courts have consistently distanced equitable estoppel from contract. Secondly, issues of liability in Australia turn on reliance, rather than promise. Thirdly, a reliance-based approach to equitable estoppel relief is new to Australia. The instinct for expectation relief evoked by the concept of an estoppel should disappear as the new approach adopted by the High Court in *Verwayen* comes to be more widely understood.

A further reliance-based explanation for the regular awarding of expectation relief is that reliance loss is often very difficult to calculate. That explanation is supported by the recent Australian cases. It is only in a limited number of cases that a representee's reliance loss can be quantified with precision. Indeed, of the 30 reported cases since *Verwayen* discussed in Chapter 7, only four could be argued to have been wrongly decided on the ground that equitable compensation, representing the representee's reliance loss, should have been awarded instead of expectation relief. In cases where reliance loss cannot be quantified with precision, the only means by which to protect the reliance interest is the granting of expectation relief. The regularity with which expectation relief is provided does not, therefore, undermine the reliance basis of the doctrine.

The realist approach of Yorio and Thel sheds considerable light on the state of promissory estoppel in the United States. Since the reliance basis of the doctrine has been widely accepted in those jurisdictions for over 60 years,[32] it is important to consider whether the courts are in fact deciding cases by reference to reliance. A realist examination also sheds some light on the Australian

[32] Larry DiMatteo, 'The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment' (1997) 48 *University of Southern California Law Review* 293, 302 (n 40), has suggested that the first notable case to recognise detrimental reliance as a substitute for bargained-for consideration was *Allegheny College v National Chautauqua County Bank*, 159 NE 173 (NY 1923). According to Michael Metzger and Michael Phillips, 'The Emergence of Promissory Estoppel as an Independent Theory of Recovery' (1983) 35 *Rutgers Law Review* 472, 484, '[t]he new reliance-based doctrine got full recognition in 1932, when the first

position. Although a reliance-based approach to relief now represents the law in Australia, it is clear that the recent doctrinal developments have not been reflected in the results of all of the cases since.[33] A truly reliance-based approach to relief in equitable estoppel is, however, only eight years old in Australia, having been adopted by five members of the High Court in *Verwayen* in 1990. It is, therefore, far too early to abandon the reliance-based approach on the basis that it is not being applied strictly in the determination of relief.

(b) Common law estoppel

The question whether common law estoppel is based on promise raises slightly different considerations. Like equitable estoppel, common law estoppel also does not depend on the making of a promise. As discussed in Chapter 3, common law estoppel depends on the representor inducing the representee to adopt an assumption as to the existence of a state of affairs. There is no requirement that the representor's conduct must convey a commitment that a certain state of affairs exists. The central focus in the establishment of an estoppel at common law is on the representee's detrimental reliance on the faith of the assumption he or she has been induced to adopt.

Unlike equitable estoppel, however, common law estoppel can be said to be promise-based in its remedial effect. The effect of an estoppel at common law is to make good the representee's assumption, by holding the representor to the truth of that assumption and determining the rights of the parties accordingly. This preclusionary effect of common law estoppel seems at odds with suggestions that the purpose of common law estoppel is to prevent detriment resulting from reliance on an assumption of fact induced by another person.

Restatement of Contracts was published.'

[33] As discussed in Chapter 7, although the reliance-based approach does not appear to have affected the outcome of any of the cases reported to date, it has had a striking effect in at least one unreported case: *The Public Trustee, as Administrator of the Estate of Williams (dec'd) v Wadley* (Full Court of the Supreme Court of Tasmania, Wright, Crawford and Zeeman JJ, 27 June 1997).

That is particularly so when, in cases such as *Avon County Council v Howlett*,[34] we see the representee's expectations fulfilled, even where doing so exceeds the reliance loss suffered by the representee. Accordingly, although the establishment of a common law estoppel is clearly not based on promise, in the sense of a commitment to the existence of a state of affairs, the remedy provided by common law estoppel is promise-based, in the sense that the representor is held to the truth of the assumption which they have induced the representee to adopt, regardless of the extent of the representee's reliance on that assumption.

2. Subsuming Equitable Estoppel within Contract

Like Yorio and Thel, Patrick Atiyah also sees equitable estoppel as essentially concerned with the enforcement of promises, and advocates the expansion of the scope of the law of contract to encompass cases currently decided on the basis of equitable estoppel.[35] The essence of Atiyah's argument is as follows. The enforcement of promises is the province of the law of contract. Tort and equity are often invoked in situations in which it would be perfectly plausible, and more appropriate, to suggest that liability exists in contract.[36] Estoppel is invoked for two reasons: first, simply because it is fashionable, and, secondly, in order to evade the inconvenient technical rules preventing liability from arising in contract, such as uncertainty or lack of writing.[37]

In order to overcome those technical rules, according to Atiyah, the courts should recognise that once an agreement has been acted upon, or relied upon, it

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[34] [1983] 1 All ER 1073.

[35] Atiyah, above n 14, 137-41. Similarly, Samuel Stoljar, 'Estoppel and Contract Theory' (1990) 3 *Journal of Contract Law* 1-22 has argued that both common law and equitable estoppel are essentially based on agreement, and such agreements are capable of being integrated within contract law itself. The deficiencies of contract law should, he suggests, be cured by a reconstruction of relevant contract principles, rather than by supplementing them with estoppel.

[36] Atiyah, above n 14, 139.

[37] Ibid. Atiyah does not regard the doctrine of consideration as an inconvenient technical rule because he argues that the representee's detrimental reliance could itself be regarded as providing the necessary consideration. In other words, he advocates an expanded conception of what suffices to satisfy the consideration requirement.

may be justifiable to recognise contractual rights which would not have been recognised before such action or reliance.[38] An uncertain agreement, for example, should be enforced in some way when it has been partly performed. If the law of contract recognised action in reliance as changing the situation, then there would be less need for estoppel. Some judges and writers are reluctant to admit such a possibility because, in accordance with classical principles, they see contractual liability as stemming from the agreement and consider that action in reliance cannot change the rights of the parties.[39]

What Atiyah is proposing is, in effect, that equitable estoppel be subsumed, wholly or partly, by the law of contract. The result of the relaxation of contract rules in cases where non-bargain promises have been detrimentally relied upon, would be to impose contractual liability in many cases in which equitable estoppel presently provides the only remedy. Depending on how many contractual rules were relaxed in the event of detrimental reliance, the need for equitable intervention could disappear completely. The effect of Atiyah's proposal would be similar to the approach articulated in s 90 of the Restatement of Contracts (2d) in the United States, where detrimental reliance on a promise gives rise to contractual liability, justifying the 'enforcement' of that promise. In fact, Atiyah has gone so far as to suggest that 'it may soon be necessary to insist that detrimental reliance is simply an alternative to consideration as a source of contractual rights.'[40]

While it has some superficial attraction, there are several reasons why the adoption of Atiyah's proposals is not warranted in Australia. First, Atiyah's attention is focussed on the contractual context, and the role of estoppel in the enforcement of promises. Although Atiyah acknowledges the very considerable role of estoppel outside the realm of promises,[41] his reform proposals do not take that important aspect of estoppel into account. It is clear that equitable

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[38] Ibid.
[39] Ibid 140.
[40] Ibid 141. See also PS Atiyah, 'Consideration: A Restatement' in *Essays on Contract* (1986) 179, 240. This approach is also favoured by Birks, above n 10, 60-64.
[41] Atiyah, above n 14, 148.

estoppel overcomes more fundamental problems than a lack of consideration and a failure to comply with formalities, including the lack of a clear agreement or understanding between the parties[42] and, in many cases, the lack of a promise.[43] Equitable estoppel very often deals with cases in which there is clearly no agreement struck between the parties, and it would be extremely artificial to attempt to rationalise liability in such cases on a contractual basis.[44] Promises could be implied in order to bring some cases within the contractual framework, but there are many cases in which a promise could not be implied without considerable artificiality.[45]

Accordingly, the appropriate solution to the inadequacy of contract law in coping with reliance is not to expand contract, but to allow the development of

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[42] *Holiday Inns Inc v Broadhead* (1974) 232 EG 951, 1087 (Goff J), in a passage adopted by the Privy Council in *A-G of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd* [1987] 2 All ER 387, 391.

[43] See, eg, *S & E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122 ALR 637, where liability arose out of a course of conduct by a landlord, during negotiations for the surrender of a lease and the granting of a new lease, which induced the tenant to assume that the relationship of landlord and tenant would continue without the tenant having to exercise an option for renewal. Although the landlord's conduct clearly induced the tenant to adopt the relevant assumption, it is not possible to characterise the landlord's conduct as a promise or a even a representation. Similarly *Hughes v Metropolitan Railway Co* [1877] 2 AC 439; *Birmingham and District Land Co v London and North Western Railway Co* (1888) 40 Ch D 268.

[44] Atiyah has acknowledged this elsewhere: PS Atiyah, 'Fuller and the Theory of Contract' in *Essays on Contract* (1986) 73, 88; see also Hugh Collins, *The Law of Contract* (2nd ed, 1993) 83.

[45] The clearest examples are provided by cases of estoppel by acquiescence, founded on the principle articulated in *Dann v Spurier* (1802) 7 Ves Jun 232; 32 ER 94, 95 (Lord Eldon); *Ramsden v Dyson* (1866) LR 1 HL 129, 140-1 (Lord Cranworth LC), 168 (Lord Wensleydale) *Willmott v Barber* (1880) 15 Ch D 96, 105-6 (Fry J) and *Svenson v Payne* (1945) 71 CLR 531, 539 (Latham CJ, Rich and Williams JJ), that where the owner of land stands by and knowingly allows another to build on that land under a mistake as to title, equity will not allow the owner subsequently to assert his or her rights. Examples of the application of that principle, in circumstances in which no promise could be implied on the part of the landowner, include: *Huning v Ferrers* (1711) Gilb Eq 85; 25 ER 370 (representee built on land assuming he had possession under a valid lease); *Savage v Foster* (1723) 9 Mod 35; 88 ER 299 (representee purchased and build on land assuming he was obtaining good title); *Steed v Whitaker* (1740) Barn Ch 220; 27 ER 621 (mortgagee allowed the representee to build on mortgaged property without giving the representee notice of the mortgage); *Hardcastle v Shafto* (1793) 1 Anst 184; 145 ER 839 (representees spent money improving land on the assumption that they had possession under a valid lease); *Hamilton v Geraghty* (1901) 1 SR (NSW) (Eq) 81 (representee built on land assuming it was his own); *Attorney General to HRH Prince of Wales v Collom* [1916] 2 KB 193 (representee expended money on improvements to a house, believing it to be her own); *The Queen v Smith* (1981) 113 DLR (3d) 522 (the Crown knowingly stood by while representees improved land). Nor could a promise could be implied in those analogous cases in which the holders of interests in property have been estopped from asserting their interests as a result of knowingly standing by while another person acquires an interest in the property from a third party, eg: *Savage v Foster* (1866) 9 Mod 36; 88 ER 299; *Gregg v Wells* (1839) 10 Ad & E

a coherent jurisdiction for the protection of reliance outside contract to continue.[46] Another significant reason for allowing those developments to proceed outside contract is that detrimental reliance on a promise does not always justify the enforcement of that promise according to contractual principles. As Atiyah has conceded elsewhere,[47] there is no obvious reason for protecting the promisee's expectation interest in estoppel cases.[48]

This raises the important question whether there need necessarily be consistency between the determination of liability and the determination of remedy. Commentators are divided on this issue. On the one hand AS Burrows has argued that the remedy provided by a particular doctrine should be consistent with the basis of liability.[49] On the other hand Hugh Collins has suggested that it is a mistake to suppose that the same policies and values should determine both questions of liability and the measure and type of remedies available.[50] There is an important philosophical reason why the first approach should be preferred and the question of remedy should turn on essentially the same questions as liability. As argued throughout this thesis, questions of liability and questions of remedy should both be addressed in a way that is consistent with the essential purpose of the doctrine. They should ultimately be consistent with one another because they should each be framed with that fundamental purpose in mind. As Patrick Parkinson has suggested, '[t]he remedy should accord with the reason for intervention'.[51] If the reason for intervention is to prevent harm being suffered by the representee as a result

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90; 113 ER 35; *Midland Bank Ltd v Farpride Hatcheries Ltd* (1981) 260 EG 493.

[46] Cf JW Carter, 'Contract, Estoppel and Unconscionability' (1993) 1 *Judicial Review* 129, 131, who also advocates the reform of contractual rules, rather than the development of estoppel, on the basis that the continued development of estoppel and neglect of the law of contract might have the effect of stultifying contract.

[47] PS Atiyah, *Promises, Morals and Law* (1981) 42. See also Atiyah, above n 40, 240.

[48] Fuller and Perdue, above n 2, 64-5. Cf AS Burrows, 'Contract, Tort and Restitution - A Satisfactory Division or Not' (1983) 99 *Law Quarterly Review* 217, 243-4 & 259.

[49] Burrows, above n 48, 265: 'the law should not, and if correctly understood, does not show any inconsistency between the basis of liability and the basis for assessing damages.'

[50] Collins, above n 44, 85. Similarly, Birks, above n 10, 63-4, argues that, although liability in estoppel is based on detrimental reliance, there is still a choice to be made between a reliance-based and an expectation-based approach to remedy.

[51] Patrick Parkinson, 'Equitable Estoppel: Developments after Waltons Stores (Interstate) Ltd v Maher' (1990) 3 *Journal of Contract Law* 50, 59.

of his or her reliance on the conduct of the representor, then questions of remedy and liability should both focus on that harm.

Apart from questions of consistency between liability and remedy and between remedy and purpose, there is also an important policy reason why a contractual approach to remedies is inappropriate in estoppel cases. Although Chapter 7 showed that expectation-based remedies are granted in all common law estoppel cases and most equitable estoppel cases, there are cases at the margins in which fulfilment of the representee's expectations is quite unnecessary and would cause injustice to the representor.

The point can be illustrated by way of an example of a promise to make a gift. Assume A promises to make a gift of land worth $100,000 to B. In reasonable reliance on that promise, and with A's knowledge, B spends $5,000 on improvements to the land. B's detrimental reliance is substantial, but is not proportional to the value of the expectation. If A later refuses to make good the promise, then the court does not intervene because A has breached a promise to make a gift, but rather because B will suffer harm as a result of reliance upon the assumption which A's conduct caused B to adopt. As Paul Finn[52] and RD Oughten[53] have observed, there is no obvious imperative in public policy which should give the expectation interest paramountcy in such cases. In a case where a representor has not promised or undertaken to make a gift, but has simply led a representee to believe that one will be made, it is even more clear that there is no reason to fulfil the representee's expectations, unless it is necessary to do so in order to prevent the representee suffering harm.

Fuller and Perdue have observed that most of the arguments for awarding expectation damages in the case of bargain promises do not apply in the case of promises that are enforced because they have been relied upon.[54] Fuller and Perdue argue that the main reasons for awarding expectation damages in the

[52] PD Finn, 'Equity and Contract' in PD Finn (ed), *Essays on Contract* (1987) 104, 122.
[53] RD Oughten, 'Proprietary Estoppel: A Principled Remedy' (1979) 129 *New Law Journal* 1193, 1195.

case of bargain promises are: first, to give executory contractual rights a present value for the purposes of trade and credit; secondly, to facilitate reliance on business agreements; thirdly, to provide simple and effective compensation for the loss of opportunities to enter into other contracts; and, fourthly, to provide a more easily administered measure of recovery than reliance damages and, therefore, a more effective sanction against contract breach.[55] The last three policy considerations might be argued to have some application to non-contractual promises relied upon by the promisee, but it is clear that none of the considerations hold as strongly for reliance cases as they do for bargain contracts.

Elizabeth Cooke has recently argued that the English courts should not follow the lead of the Australian courts in adopting a reliance-based approach to remedy in equitable estoppel cases.[56] She provides four arguments in support of her claim that the English courts should continue to protect expectations in full so far as is possible. First, Cooke suggests that protecting reliance loss would 'confuse and emasculate the law of estoppel'.[57] This thesis has shown, however, that the increased emphasis on reliance in the Australian doctrine has made the determination of questions of remedy more consistent with the approach to liability, and has made the doctrine more coherent than its English counterpart. Far from creating uncertainty, the High Court's adoption of a reliance-based approach to remedy in equitable estoppel has put an end to the remedial uncertainty attaching to the doctrine, which has been strongly criticised by a number of commentators.[58] As Chapter 7 has shown, expectation remedies continue to be granted in most cases, but the reliance-based approach operates at the margins to prevent injustice where the representee's expectations are disproportionate to his or her detrimental reliance.

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[54] Fuller and Perdue, above n 2, 64.
[55] Ibid 59-64.
[56] Cooke, above n 31, esp at 258 & 280-5.
[57] Ibid 280.
[58] See, eg: Oughten, above n 53; Peter Birks, *An Introduction to the Law of Restitution* (1985) 293; Burrows, above n 48, 243.

Secondly, Cooke argues that the adoption of reliance loss theory would lead to inconsistencies with the law of restitution because there would inevitably be cases in which the courts would grant restitutionary remedies.[59] It is not at all clear why the courts would grant restitutionary remedies under a reliance-based approach. Under the reliance-based approach discussed in Chapter 7, the courts would only protect the representee's restitution interest where that interest happened to coincide with the representee's reliance interest. That occasional coincidence would not undermine the law of restitution any more than the law of contract is undermined by the common protection of the representee's expectation interest in equitable estoppel cases.[60] As will be discussed below, a reliance-based doctrine of equitable estoppel is clearly distinguishable from the law of unjust enrichment: it serves a fundamentally different purpose and adopts fundamentally different approaches to questions of liability and remedy.[61]

The third argument made by Cooke is that a doctrine of estoppel which protects the reliance interest is not an appropriate way to supplement the doctrine of consideration. She argues that the law of contract is sufficiently flexible to cover reliance which has not been bargained for, and such reliance should be protected within the law of contract itself.[62] If it is felt desirable to enforce relied-upon promises, Cooke argues, then the remedy for breach of such promises should be an expectation remedy. As the above discussion showed, however, there is no good reason why the remedy granted in the case of relied-upon promises should exceed the reason for intervention. The question whether it is preferable to expand the scope of contract to deal with relied-upon promises will be discussed further below.

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[59] Cooke, above n 31, 281-2.

[60] It now seems quite clear that the law of contract is not under threat from doctrines like estoppel, despite the predictions of 'death of contract' theorists: see Andrew Robertson, 'Situating Equitable Estoppel Within the Law of Obligations' (1997) 19 *Sydney Law Review* 32, 39-40

[61] Below, text accompanying nn 117-140.

[62] Cooke, above n 31, 283, citing in support Mescher, above n 12, whose arguments will be discussed in detail below.

The final argument made by Cooke is that the meeting of reliance loss only would be inconsistent with decided cases in which claimants would have had difficulty in proving the value of their reliance. The adoption of a reliance-based approach would, therefore, cause undesirable uncertainty.[63] This perhaps reflects a misunderstanding of the Australian approach. The Australian courts are not required to protect reliance loss only, but to seek to provide a remedy which is the minimum necessary to prevent detriment resulting from reliance. In cases in which reliance loss is difficult to calculate, the only way to ensure that reliance is fully protected is to fulfil the claimant's expectations. Chapter 7 showed that the reliance-based approach adopted by the Australian courts does not in fact affect the result in most cases, but has an impact only where the representee's reliance loss is quantifiable and is out of proportion to his or her expectation loss. Because the primary concern of the courts is to ensure that no detriment will be suffered by claimants as a result of their reliance, expectation relief remains the norm. Although it does not affect the outcome of most cases, approaching the question of remedy on the basis of reliance prevents injustice at the margins and provides a more certain measure of the equity created by an estoppel.

A final problem with the proposal made by Atiyah is that the only real mischief he advances to justify reform is the unnecessary complexity of the law in this area.[64] While that may be true of English law, it is less true of Australian law, in which it can be argued that a single, reliance-based doctrine of equitable estoppel is emerging, which operates according to clearer principles than its English counterpart. If one accepts the reliance-based framework for equitable estoppel advanced in this thesis, then the only real complexity is that there are two different types of legal obligation which can arise out of a promise. If estoppel and contract serve fundamentally different purposes, and determine questions of liability and remedy according to fundamentally different

[63] Cooke, above n 31, 280-1, 285.
[64] Atiyah, above n 14, 140.

considerations,[65] then those differences surely justify the complexity of two different sources of obligation.

3. Abolishing the Doctrine of Consideration

Barbara Mescher sees equitable estoppel as an intrusion by equity into the area of promise enforcement, which, she says, should belong exclusively to the law of contract. Her solution to that intrusion is to abolish the doctrine of consideration.[66] The requirement of an intention to create legal relations would then be left to perform alone the important task of determining which promises to enforce.[67] Abolishing the doctrine of consideration, Mescher says, would 'place most of the fact situations found in equitable estoppel cases within the province of contract.'[68]

The first problem with Mescher's criticism of equitable estoppel is that it hinges on an oversimplified distinction between assumed and imposed obligations. Mescher argues that in contract the obligations arise from the parties' promises, whereas in estoppel, since there is not necessarily an overt act of acceptance by the promisee, obligations are imposed by the court.[69] In the case of contract, she says, the parties create many of the obligations, whereas in equitable estoppel the obligations imposed by the court 'may vary according to the circumstances of the case and the general notions of unconscionability.'[70]

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[65] See above nn 16-20 and accompanying text.
[66] Above n 12, 562-6.
[67] Similarly, Randy Barnett, above n 13, 291-321, has suggested that all contractual liability should be based on a contracting party's 'consent to a transfer of alienable rights'. A party's consent, Barnett suggests, should be tested by looking for a manifestation of that party's intention to be legally bound. As KCT Sutton, *Consideration Reconsidered* (1974) 195-6, has pointed out, the call for an increased emphasis on the 'intention to create legal relations' requirement has been echoed by almost every writer who has advocated the abolition of the doctrine of consideration. See also KCT Sutton, 'Promises and Consideration' in Finn, PD (ed), *Essays on Contract* (1987) 35, 78-80. On the potential role of an 'intention to create legal relations' requirement in equitable estoppel, see Brian Coote, 'The Essence of Contract (Part II)' (1989) 1 *Journal of Contract Law* 183, 202-3.
[68] Mescher, above n 12, 563-4.
[69] Ibid 547-8.

The notion that contractual obligations are 'within the exclusive realm of private ordering',[71] as distinct from other legal obligations which are imposed by the state through the courts, has been subject to sustained criticism in the United States over a considerable period.[72] It is, therefore, somewhat artificial to distinguish between contractual liability and liability arising from equitable estoppel on the basis that the former is voluntarily assumed by the parties, whereas the latter is imposed on the parties by the courts. The distinctions between contractual obligations and obligations arising from equitable estoppel are in many cases purely formalistic. The realists showed us that contractual liability is not necessarily consensual[73] and, as Paul Finn has observed, many equitable estoppel cases exemplify consensual dealings left without contractual force because of the formalistic restrictions on contractual liability.[74] Even if contractual obligations can be said to be assumed by the parties, the remedies provided by the courts in the event of a breach of those obligations cannot be regarded as consensual. Leaving to one side limited exceptions such as enforceable liquidated damages clauses, the remedies for breach of contract are fashioned by the court, not by the parties.[75] It is, therefore, an oversimplification to suggest that a clear line can be drawn between contractual obligations, which are assumed by the parties, and obligations flowing from equitable estoppel, which are imposed by the court.[76]

A more fundamental problem with Mescher's proposal is that it leaves the central question, which is when liability should be imposed, to be decided

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[70] Ibid 548.

[71] Jay Feinman, 'Critical Approaches to Contract Law' (1983) 30 *University of California Los Angeles Law Review* 829, 834.

[72] See, for example, the legal realists Morris Cohen, 'The Basis of Contract' (1933) 46 *Harvard Law Review* 553, 575-8; Friedrich Kessler, 'Contracts of Adhesion — Some Thoughts About Freedom of Contract' (1943) 43 *Columbia Law Review* 629, 629-33; John Dawson, 'Economic Duress - An Essay in Perspective' (1947) 45 *Michigan Law Review* 253, 266-7 and contemporary writers such as Betty Mensch, 'Freedom of Contract as Ideology' (1981) 33 *Stanford Law Review* 753, 764-5; Feinman, above n 71, and Clare Dalton, 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94 *Harvard Law Review* 997-1114. See also PS Atiyah, 'Misrepresentation, Warranty and Estoppel' in *Essays on Contract* (1986) 275, 280-286.

[73] Ibid.

[74] Paul Finn, 'Unconscionable Conduct' (1994) 8 *Journal of Contract Law* 37, 40.

[75] PS Atiyah, 'Contracts, Promises and the Law of Obligations' in *Essays on Contract* (1986) 10, 50-1.

according to the arbitrary criterion of whether the promisor intended to create legal relations. As Atiyah has argued, the intention to create legal relations requirement is quite unsuited for this role, since the courts arrive at the conclusion that no such intention exists by means of 'fictitious reasoning': in most cases where the intention is denied, the courts are really saying that the promise in question is one that ought not to be enforced.[77] That approach is inevitable because, as a reading of almost any estoppel case shows, parties making informal promises or representations simply do not indicate whether they intend to create legal relations or intend to assume any responsibility for their actions.

The very nature of the inquiry into a party's intention to create legal relations is problematic, as Clare Dalton has explained:

> Any inquiry into a party's intent must confront the problem of knowledge—our ultimate inability to gain access to the subjective intent underlying any particular agreement.[78]

The essence of the problem, as Dalton has explained in some detail,[79] is that a subjective approach to determining the intent of a party leads us to basing liability on an unreliable assertion of intention. The alternative is to approach the question objectively, relying on an objective interpretation of external manifestations of that party's intent. A subjective approach is inherently unreliable, whereas an objective approach involves the imposition of an external standard on the parties,[80] making it difficult to deny that contract law is a system of imposed, rather than assumed, obligation.[81] The inevitable tendency to adopt an objective approach to the question of intent deprives the

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[76] See Atiyah, ibid 41.
[77] Atiyah, above n 14, 150. Similarly, John Swan, 'Consideration and the Reasons for Enforcing Contracts' in Barry Reiter, and John Swan (eds), *Studies in Contract Law* (1980) 23, 58. Cf PS Atiyah, 'Consideration: A Restatement' in *Essays on Contract* (1986) 179, 241.
[78] Dalton, above n 72, 1011.
[79] Ibid 1039-1066.
[80] Charles Fried, *Contract as Promise* (1981) 61. See also Sir Anthony Mason and SJ Gageler, 'The Contract' in PD Finn (ed), *Essays on Contract* (1987) 1, 8.
[81] Dalton, above n 72, 1066.

inquiry as to intention of its primary justification, which is that it facilitates the implementation by the courts of the will of the parties.[82]

The final problem with Mescher's proposal is the absence of a need for such radical reform. Mescher has advocated reform on the basis that promise enforcement should be the exclusive domain of the law of contract. Recent decisions, though, have shown that it is bargains that are the exclusive domain of contract.[83] On the present state of the law, promises will give rise to contractual liability when they have been bargained for, and will give rise to liability in estoppel where they have been reasonably relied upon. The law of contract is certainly narrower than it was in pre-classical times when reliance upon a promise was regarded as a reason for its enforcement, but there is no compelling reason to restore the territory of reliance to the empire of contract.

It is also important to note that, since promise theorists are generally only concerned with reconciling equitable estoppel with contract, promise theory gives a misleading impression of the scope and nature of equitable estoppel. The doctrine is much broader than promise theorists indicate, and the relevance of contract to estoppel is somewhat overstated. This thesis has shown that the concern of equitable estoppel is not the enforcement of promises, but the much broader goal of protecting reliance on the conduct of people who depart from assumptions induced by their conduct. Although there has occasionally been confusion between contract and estoppel in the past, estoppel now has little in common with the law of contract. Considering the doctrine in terms of its relationship with contract ignores the breadth of operation of the doctrine outside the field of promises.

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[82] Similarly, Brian Coote, 'The Essence of Contract (Part 1)' (1988) 1 *Journal of Contract Law* 91, 100, has observed that the common law's response to the impossibility of ascertaining the will of the parties has been to apply objective tests of will and intention. While resort to an objective test makes an inquiry into the parties' intention practically possible, it destroys the notion that the parties' will is the basis of the contract, 'since it is not necessarily the actual will which is the determinant.'

[83] *Beaton v McDivitt* (1987) 13 NSWLR 162, 168-9 (Kirby P), 180-2 (McHugh J).

B. *Conscience Theory*

Like promise theory, conscience theory has both descriptive and normative aspects: its proponents suggest that estoppel does and should operate by reference to the concept of unconscionability.[84] Conscience theory is, however, far more elusive than promise theory because, although considerable support can be found in the commentary for the notion that a concern with unconscionability is,[85] and should be,[86] the basis of equitable estoppel, neither the descriptive claim nor the normative claim has been spelt out in any detail. Only one commentator, Margaret Halliwell, has gone beyond those broad assertions and made a clear argument that equitable estoppel is, and should be, organised around the concept of unconscionability.[87] According to Halliwell: '[i]t is now necessary to recognise that the organising concept of estoppel is unconscionability because the function of estoppel is to restrain injustice resulting from unconscionable conduct.'[88]

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[84] It is important to distinguish here between, on the one hand, proponents of a truly conscience-based doctrine and, on the other hand, those who simply invoke the rhetoric of unconscionability in support of an approach that is clearly reliance-based. For examples of the latter approach, see *Verwayen* (1990) 170 CLR 394, 428-9 (Brennan J) and 501 (McHugh J).

[85] Eg: Eugene Clark, 'The Swordbearer has Arrived: Promissory Estoppel and Waltons Stores (Interstate) Ltd v Maher' (1987-9) 9 *University of Tasmania Law Review* 68, 73 ('unconscionability is the unifying principle which forms the basis of the different heads of equity incorporated under equitable estoppel'); Joshua Getzler, 'Unconscionable Conduct and Unjust Enrichment as Grounds for Judicial Intervention' (1990) 16 *Monash University Law Review* 283, 305-6 (the 'unified principle of equitable estoppel' is 'based on the prevention of unconscionable conduct'); Mark Lunney, 'Towards a Unified Estoppel—The Long and Winding Road' [1992] *The Conveyancer and Property Lawyer* 239, 250 (all forms of estoppel have the prevention of unconscionable conduct as their foundation); Kris Arjunan, 'Waiver and Estoppel - A Distinction Without a Difference' (1993) 21 *Australian Business Law Review* 86, 109 ('unconscionability is the undercurrent of equitable estoppel'); Sir Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238, 254 ('the concept of unconscionability has been at the heart of the doctrinal refinements which have been made' to equitable estoppel); Carter and Harland, above n 3 (unconscionability is the touchstone for estoppel by conduct).

[86] Eg: Lunney, ibid, advocates the adoption of 'a unified doctrine of estoppel based on unconscionability'; Mason, ibid 255, also appears to advocate the 'elaboration of the doctrine of estoppel by means of unconscionability.'

[87] Margaret Halliwell, 'Estoppel: Unconscionability as a Cause of Action' (1994) 14 *Legal Studies* 15.

[88] Ibid 15.

Halliwell argues that proprietary estoppel[89] is conscience-based because the cause of action is not a response to the representee's reliance, but to the type of conduct engaged in by the representor.[90] Proprietary estoppel, according to Halliwell, does not seek to compensate for reasonable reliance because the concern of equity, as Lord Evershed has said, is not to do justice, but rather to restrain injustice.[91] Halliwell's advocacy of a conscience-based equitable estoppel is both descriptive and normative. She suggests that the 'modern tendency, *as evidenced by all case law*, is to treat estoppel as a legal response triggered by a cause of action founded upon unconscionability'.[92] Halliwell does not, however, make good her descriptive claim. She does not attempt to show that the doctrine operates by reference to unconscionability, rather than reliance. Although she purports to include the Australian cases within her framework, she does not explain why a cause of action which is 'not a response to the reliance itself'[93] is so fundamentally concerned with reliance in the determination of questions of liability and remedy.

Since the unconscionability question necessarily involves an examination of the knowledge and conduct of the representor,[94] the essential difference between a cause of action founded on unconscionability and one founded on reliance must be that the former is essentially defendant-focussed (or concerned with the position of the representor), while the latter is essentially plaintiff-focussed (or concerned with the position of the representee). In the case of equitable estoppel, questions of liability and remedy are clearly not determined by reference to the position of the representor. Turning first to questions of liability, a consideration of the conduct of the representor is essential for

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[89] It should be noted that Halliwell, ibid 15 & 22-30, distinguishes proprietary estoppel, which she suggests is conscience-based, from promissory estoppel, which is not based on the concept of unconscionability, but is essentially contractual, representing a limited exception to the requirement of consideration in relation to gratuitous variations to contracts.
[90] Ibid 17.
[91] Ibid, citing Raymond Evershed, 'Reflections on the Fusion of Law and Equity After 75 Years' (1954) 70 *Law Quarterly Review* 326, 329.
[92] Halliwell, above n 87, 33 (emphasis added).
[93] Ibid 17.
[94] See *Verwayen* (1990) 170 CLR 394, 444 (Deane J); NC Seddon and MP Ellinghaus, *Cheshire and Fifoot's Law of Contract* (7th Aust ed, 1997) 69; Getzler, above n 85, 323; and Chapter 2 above.

determining the threshold question whether the representor bears responsibility for the adoption of the relevant assumption, but it is then only regarded as unconscionable to depart from such an assumption if the representee has relied on that assumption to his or her detriment.

> Simply to change one's mind or to break a promise is not of itself unconscionable in the eyes of the law. But it becomes so the more that reliance has been placed on the promisor not changing his or her mind and the greater the consequential detriment that will be suffered.[95]

The question of unconscionability is, therefore, dependant upon detrimental reliance. Chapter 6 of this thesis showed that the primary concern of the courts with the position of the representor is in determining whether the representor can be said to bear sufficient responsibility for the assumption adopted by the representee. In cases of silence the courts consider the representor's knowledge of the representee's reliance but, even in those cases, it seems that the courts will adopt an objective approach to the question of knowledge, suggesting that the courts are not really concerned with the representor's conscience at all.

As I will argue below, this thesis has shown that the approach of the Australian courts to the establishment of an estoppel is characterised by its focus on the position of the representee.[96] Accordingly, it is difficult to see how the cause of action can be said to be based on unconscionability, rather than reliance. Similarly, although relief is occasionally said to be shaped by reference to unconscionable conduct,[97] under the approach laid down by the High Court in *Verwayen*, relief is determined exclusively by reference to the representee's detrimental reliance, with no consideration whatsoever of the knowledge or conduct of the representor.[98]

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[95] Seddon and Ellinghaus, ibid 65.
[96] See below nn 108-112 and accompanying text.
[97] See, eg, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 419 (Brennan J).
[98] *Verwayen* (1990) 170 CLR 394, 415-7 (Mason CJ), 429-30 (Brennan J), 454 (Dawson J), 475 (Toohey J), 500-1 (McHugh J). See Chaper 7 above.

It is even clearer that common law estoppel is not based on preventing unconscionable conduct. The notion of conscience playing a role in the common law doctrine was discussed in Chapter 2. That discussion concluded that, although it may seem incongruous for such a concept to play a role in a common law principle, it is widely accepted that the equitable notion of unconscionable departure from an assumption is equivalent to the common law concept of unjust or inequitable departure. As Chapter 6 showed, however, the common law doctrine has always focussed primarily on the position of the representee, looking only to the position of the representor in order to determine whether the representor bears responsibility for the representee's adoption of the relevant assumption. Accordingly, common law estoppel is no more concerned with questions of the representor's conscience than the equitable doctrine.

Turning to the normative claim, Halliwell fails to outline how a conscience-based doctrine of equitable estoppel would operate, except to emphasise the considerable flexibility and discretion the courts have at their disposal in determining equitable estoppel cases.[99] Indeed, it is difficult to see what role conscience can play in a coherent doctrine of equitable estoppel. The first problem is the indeterminacy of the concept of unconscionability, which, as Justice Gleeson has said extra-judicially, is too vague a legal standard to be applied consistently or predictably.[100] Attempts in England to unite promissory and proprietary estoppel on the basis that both involve a simple application of the question whether it would be unconscionable for a promisor to go back on his or her promise, have also been criticised as unhelpful, 'as they provide no basis on which a legal doctrine capable of yielding predictable results can be developed.'[101] While acknowledging that 'unconscionability is very much a matter of fact, degree and value judgment', Sir Anthony Mason has defended the standard, suggesting that it is erroneous to believe that 'rigid rules promote

[99] Halliwell, above n 87, 32.
[100] AM Gleeson, 'Individualised Justice — The Holy Grail' (1995) 69 *Australian Law Journal* 421, 425-7.
[101] GH Treitel, *The Law of Contract* (9th ed, 1995) 136.

clarity and certainty in the law.'[102] A middle ground can, however, be found between rigid rules and broad concepts such as unconscionability, which do little more than convey a notion of moral criticism.[103]

Leaving to one side the indeterminacy of the broad principle of unconscionability, it is difficult to see what role the representor's knowledge and conduct can play in determining liability, beyond the threshold question whether the representor bears sufficient responsibility for the representee's adoption of the relevant assumption. The most significant problem with a conscience-based approach, however, is that the representor's conscience does not provide sufficient guidance in the difficult, but fundamental, question of the relief to be provided to give effect to an estoppel in a particular case. The essential question in the granting of relief in an estoppel case is whether the representor's expectation interest or reliance interest should be protected.[104] While there might be some cases in which the representor's conduct might be seen to be sufficiently reprehensible as to require the fulfilment of the representee's expectations,[105] in most cases the nature of the representor's conduct does not help the courts to choose between reliance and expectation relief. The notion of assuaging the representor's conscience does not, therefore, provide any real guidance in the determination of relief. The adoption of a conscience-based approach to relief would, as Gleeson has suggested:

> give rise to difficult questions as to how one distinguishes between the circumstances where conscience requires the representor to make good a representation, and the circumstances where it is sufficient to require the representor to compensate the representee for the loss suffered by reliance upon the representation.[106]

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[102] Mason, above n 85, 256.
[103] Birks, above n 10, 16-17 has suggested that 'the word "unconscionable" is so unspecific that it simply conceals a private and intuitive evaluation.'
[104] See Chapter 7 above.
[105] Alec Leopold, 'Estoppel: A Practical Appraisal of Recent Developments' (1991) 7 *Australian Bar Review* 47, 59, suggests, for example, that where the encouragement offered by the representor to the representee to proceed along a certain course is extensive and of lengthy duration, then such 'extreme unconscionability' might justify the grant of expectation relief.
[106] Gleeson, above n 100, 427.

C. *Reliance Theory*

1. The Reliance Basis of Estoppel

As discussed in Chapter 2, the reliance theory of estoppel holds that the objective of promissory estoppel is to protect promisees from loss caused by reliance on a promise, and that issues of liability and remedy should turn on reliance. This thesis has shown that, although there is some equivocation between promise, conscience and reliance in the determination of questions of liability and remedy, estoppel by conduct in Australia now operates primarily by reference to the representee's reliance.[107] The reliance basis of estoppel by conduct in Australia was established in the above discussion of the application of Yorio and Thel's claims to the Australian context.[108] That discussion outlined three aspects of the Australian doctrines which establish their reliance basis: first, the strict requirement of detrimental reliance by the representee in the establishment of liability which was examined in Chapter 4; secondly, the relative weakness of the emerging requirement, explored in Chapter 3, that the representee's assumption must be induced by the conduct of the representor; and, thirdly, in the case of the equitable doctrine, the recent adoption by the High Court of a reliance-based approach to relief, which was outlined in Chapter 7. To that list can be added the fact that there also appears to be a preference for considering the question of reasonableness from the representee's perspective, rather than that of the representor.[109]

The reliance basis of equitable estoppel is supported by Nicholas McBride's analysis of the fundamental duty underlying equitable estoppel and other doctrines.[110] McBride argues that the doctrines of equitable estoppel recognised in England and Australia, and the doctrine of promissory estoppel recognised in

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[107] Similarly, Metzger and Philips, above n 32, 536-543 have argued that the doctrine of promissory estoppel recognised in the United States is an independent, non-contractual, reliance-based cause of action.
[108] Above nn 16-32 and accompanying text.
[109] See Chapter 5 above.

the United States, are manifestations of an 'as yet undefined' duty to prevent detrimental reliance on a promise.[111] The duty that emerges from the recent Australian cases is even wider than McBride suggests. Liability under the Australian doctrine does not depend on the making of a promise, but rather on the representee adopting an assumption induced by the conduct of the representor.[112] As discussed above, that assumption can be induced by several different types of conduct, including a representation, a course of conduct and even silence in certain circumstances.[113] Accordingly, the duty on which the Australian doctrine of equitable estoppel is based must be a duty to prevent harm being suffered by those who rely on one's conduct, not just on one's promises.[114] Estoppel does not, of course, protect against all such harm. If it did, it would render redundant the torts of deceit and negligent misstatement, as well as the statutory protection against harm resulting from misleading or deceptive conduct. The particular harm against which estoppel protects is the harm resulting from reliance on the conduct of another person *where that person departs from the assumption induced by his or her conduct.*[115]

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[110] McBride, above n 9, 45-50.

[111] More recently, Nicholas McBride, 'The Classification of Obligations and Legal Education' in Peter Birks (ed), *The Classification of Obligations* (1997) 71, 77 has characterised the obligation created by equitable estoppel as an obligation 'not to make someone worse off as a result of that someone's relying on one's promise', which is considerably closer to the characterisation of the relevant obligation in this thesis. McBride, ibid, also noted that, unlike the position in Australia and the United States, the relevant obligation 'is not fully enforced in English law' because it is restricted to promises to enforce rights and promises to give someone an interest in one's land.

[112] *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 407 (Mason CJ and Wilson J), 428-9 (Brennan J), 447-55 (Deane J), 458 (Gaudron J); *Verwayen* (1990) 170 CLR 394, 412-3 (Mason CJ), 444 (Deane J), 460-1 (Dawson J), 487 (Gaudron J), 500 (McHugh J).

[113] Above nn 26-28 and accompanying text.

[114] Michael Spence, 'Australian Estoppel and the Protection of Reliance' (1997) 11 *Journal of Contract Law* 203, 204 has characterised the duty created by equitable estoppel as a 'duty to ensure the reliability of induced assumptions'. This is a most inaccurate way to characterise the duty, since both the primary and secondary duties are based on harm. As Spence acknowledges (esp at 204 & 208), an estoppel will only arise where harm is suffered as a result of reliance on an induced assumption, and the remedy is based on providing protection against such harm. Accordingly, it is clear that there is no duty to ensure the reliability of induced assumptions, but only a duty to ensure that harm does not result from reliance on such assumptions.

[115] Thus, as Brennan J observed in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 427, equitable estoppel 'complements the tortious remedies of damages for negligent misstatement or fraud and enhances the remedies available to a party who acts or abstains from acting in reliance on what another induces him to believe.'

The remedial effect of common law estoppel prevents it from operating strictly in accordance with the duty outlined above: although it only operates where harm is suffered as a result of reliance, its effect is not limited to the prevention of such harm. It is interesting to note, however, that the unified estoppel envisaged by Mason CJ in *Verwayen* accords entirely with that duty. It is a substantive doctrine, which applies to both assumptions of existing fact and assumptions relating to the future conduct of the representor. It operates where the representee has relied on such an assumption to his or her detriment, and its effect is to require the representor to prevent or compensate harm resulting from the representee's reliance on the representor's conduct, where the representor seeks to act inconsistently with the assumption induced by that conduct.

2. Equitable Estoppel as Part of the Law of Wrongs

Having established the nature of the duty created by equitable estoppel, the next step is to locate it within the law of obligations. The traditional classification of common law obligations is threefold, the categories being contract, tort and restitution (or unjust enrichment).[116] If one is dealing with equitable causes of action as well, then the category of tort will need to be expanded to cover all civil wrongs, both common law and equitable. More sophisticated taxonomies are necessary to accommodate all causes of action within the law of obligations.[117] The threefold classification is adequate for present purposes, however, since the essential question here is whether the duty established by equitable estoppel should be regarded as part of the law of contract or as part of the law of civil wrongs. Three different means of classifying a cause of action can be identified.[118] First, one can look to the origin of the duty or the source of

[116] Peter Birks has convincingly argued that the third category of obligation is better described by reference to the event giving rise to the obligation (unjust enrichment), rather than the remedial response to that event (restitution): Birks, above n 10; Peter Birks, 'Definition and Division: A Meditation on *Institutes* 3.13' in Peter Birks (ed), *The Classification of Obligations* (1997) 1, 20-1.

[117] See, for example, McBride, above n 9, Birks, above n 10, esp at 8-16; Peter Birks, 'The Concept of a Civil Wrong' in David Owen (ed), *Philosophical Foundations of Tort Law* (1995) 31; Birks, above n 116; McBride, above n 111, 71-89.

[118] The first two of these methods are used by McBride, above n 9, 35; the third is used by

liability, secondly one can look to its content, or the pattern by which liability is established, and thirdly, one can look to its remedial consequences. Each of those aspects of equitable estoppel will be examined in turn.

An essential characteristic of a wrong, which distinguishes it from contractual liability, is that it is a breach of a primary duty, primarily fixed by law.[119] That is, the duty does not arise by virtue of the consent of the parties or the occurrence of an event. Contractual duties can be seen as arising by virtue of the consent of the parties or, if one does not accept the legitimacy of the distinction between obligations assumed by the parties and those imposed by law, then one can see contractual duties as arising out of an event, which we call the formation of a contract.[120] Restitutionary duties clearly arise by virtue of the occurrence of an event, namely the enrichment of one party, at the expense of another, in circumstances in which the enrichment is regarded as unjust. The duty created by equitable estoppel does not arise by virtue of the consent of the parties, since the courts do not require even objective indicia of consent to the assumption of obligation. Nor does the obligation arise by virtue of an event; like other primary duties created by the law of wrongs, the duty to prevent harm resulting from reliance on one's conduct is owed at all times, and potentially to all parties with whom one deals.[121]

The second characteristic to be examined is the content of the duty, or the pattern by which liability is established. Nicholas McBride suggests that the duty created by equitable estoppel is not contractual in pattern because the defendants in the cases he cites were not under a duty to perform their

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Burrows, above n 48, 217-9 and Jane Stapleton, 'A New "Seascape" for Obligations: Reclassification on the Basis of Measure of Damages' in Peter Birks (ed), *The Classification of Obligations* (1997) 193.

[119] PH Winfield, T*he Province of the Law of Tort* (1931) 32; Birks, above n 10, 8-16 & 40-42; Birks, above n 117; RWM Dias et al, *Clerk & Lindsell on Torts* (16th ed, 1989) 3-4; Carlo Castronovo, 'Liability Between Contract and Tort' in Thomas Willhelmsson (ed), *Perspectives of Critical Contract Law* (1993) 273, 273-4. On the distinction between primary (or substantive) duties and secondary (or remedial) duties, see Dias et al, ibid 3-5, Birks, above n 10, 10-11; Birks, above n 117, 37-8; Birks, above n 116, 23-7.

[120] Birks, above n 10, 52.

[121] Whether the duty is owed to all persons, or whether some relationship between the parties is required, has not yet been resolved: see Chapter 5 above.

promises, but merely a duty to prevent their breaches of promise from causing detriment to plaintiffs who had relied on those promises.[122] The fact that a promise is not required to establish liability is an even clearer indication that the Australian doctrine of equitable estoppel is not contractual in pattern.[123] The duty is obviously not restitutionary since it arises independently of any enrichment of the promisor arising out of the promisee's reliance on the promise. McBride also suggests that the duty is not tortious in pattern because tortious duties require a person to constrain his or her conduct in the interests of others, not to ensure that a state of affairs exists, such as ensuring that someone is not made worse off as a result of reliance on one's promise.[124] There does not, however, appear to be any reason to define the class of civil wrongs so narrowly. A pattern for wrongs which would include equitable estoppel is that proposed by Burrows, who suggests that the cause of action in tort is based on wrongful harm, which can be contrasted with the basis of the contractual cause of action in the breach of a binding promise and the restitutionary cause of action in unjust enrichment.[125]

A third distinction between wrongs and other sources of civil liability lies in the nature of the legal response to the breach of the primary duty. Burrows has approached the question of classification on the basis of remedy, suggesting that the categories of contract, tort and restitution flow from the three 'cardinal principles' of 'the fulfilment of expectations engendered by a binding promise, the compensation of wrongful harm and the reversing of unjust enrichment'.[126] The traditional response to a breach of contract is to order the contract breaker to perform his or her promise, or to order the payment of damages calculated to place the innocent party in the position he or she would have occupied had the contract been performed. The traditional legal response to a wrong, on the other hand, is compensatory: the wrongdoer is compelled to pay damages calculated

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[122] McBride, above n 9, 49.
[123] See Chapter 3 above.
[124] Ibid.
[125] Burrows, above n 48, 218. Similarly, Castronovo, above n 119, 274, suggests that tort actions protect the interest in freedom from harm, rather than the interest in having promises enforced.
[126] Burrows, above n 48, 217.

so as to put the innocent party in the position they would have occupied had the wrong not been committed.[127] Both of those types of response can be identified in the equitable estoppel cases. A court can give effect to an estoppel by means of reliance-based relief, which reverses the detriment suffered by the representee as a result of his or her reliance on the representor's conduct.[128] Reliance-based relief is compensatory in nature and can, therefore, be identified as a typical legal response to a wrong.[129] As discussed in Chapter 7, however, a court can also give effect to an estoppel by means of expectation relief, which has the effect of fulfilling the expectations induced by the representor's conduct, and which is equivalent to the relief provided by the law of contract.

A difficulty faced in rationalising equitable estoppel as a reliance-based wrong lies in the regularity with which the courts grant expectation relief to give effect to equitable estoppel. The tendency of courts to grant expectation relief in estoppel cases, according to Hugh Collins, presents a difficulty for those who hold that harm represented by detrimental reliance not only triggers liability, but also dictates the appropriate remedy.[130] If the appropriate remedy is not designed to protect against harm, but to enforce promises or fulfil expectations, that does tend to suggest that equitable estoppel is contractual in nature.[131]

In England, it is particularly difficult to rationalise equitable estoppel as part of the law of wrongs, given the failure of the courts to articulate the basis on which relief is determined, and the tendency towards expectation relief.

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[127] It should be noted that not all commentators accept that the category of 'wrongs' should be restricted to breaches of duty for which compensatory remedies alone are granted. Derek Davies, 'Restitution and Equitable Wrongs: An Australian Analogue' in FD Rose (ed), *Consensus Ad Idem* (1996) 158-178, for example, characterises as wrongs equitable causes of action for which restitutionary remedies are available, such as breach of fiduciary duty and breach of confidence.

[128] See above Chapter 7.

[129] As noted above, in discussing the goal of equitable estoppel remedies in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 427, Brennan J observed that equitable estoppel 'complements the tortious remedies of damages for negligent misstatement or fraud and enhances the remedies available to a party who acts or abstains from acting in reliance on what another induces him to believe.'

[130] Collins, above n 44, 84-5.

[131] Cf Birks, above n 10, 12-15, and above n 117, 34-6, who argues that the legal response to a wrong is a matter of choice, not logic, and the award of compensatory damages just happens to be the response provided in the case of most wrongs.

Nicholas McBride has attempted to account for the fact that the duty to prevent detrimental reliance is so often enforced by means of enforcement of the promise. He suggests that fulfilling the promisee's expectations is an equally effectual way of preventing the representee from being made worse off as a result of the breach of promise as the more 'subtle' grant of reliance damages.[132] Hugh Collins, on the other hand, argues that the rationale for the reliance model might fit the cases better if the requirement of harm was seen as a condition of liability, but not the guiding principle of the remedy.[133] Collins suggests that the approach adopted by the English and Australian courts can be regarded as essentially the same as that applied in the United States, where the remedy may go beyond compensation for harm where justice so demands. This leaves equitable estoppel, in Collins' view, as a reliance-based form of contract, albeit one with its own distinctive set of rules and remedies.[134]

In Australia, on the other hand, it is possible to rationalise the approach to remedy in equitable estoppel with its place in the law of wrongs. Although English commentators such as Collins purport to include the Australian cases within their theories, after *Verwayen*, the position here is entirely different from that in England. In clear *dicta* in *Verwayen*, five members of the High Court adopted a reliance-based, compensatory approach to giving effect to equitable estoppel, which is the traditional legal response to a wrong.[135] Although the new approach adopted by the High Court has not yet had a great impact on the results of cases in the lower courts, the approach clearly characterises equitable estoppel as part of the law of wrongs, and there are signs that the new approach is beginning to have a significant impact in particular cases.[136] As Chapter 7 of this thesis showed, the approach taken by the High Court represents a clear

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[132] McBride, above n 9, 65-6.

[133] The question whether issues of liability and remedy should be resolved by reference to the same considerations was addressed above, text accompanying nn 49-51.

[134] Collins, above n 44, 45 & 82.

[135] Finn, above n 74, 43, suggests that 'the most transparently tort like case is *Commonwealth of Australia v Verwayen* where some number of the justices would have allowed a pecuniary award to reverse the actual detriment suffered by the plaintiff in reasonably relying on the representation of the defendant'.

[136] Eg: *The Public Trustee, as Admininstrator of the Estate of Williams (dec'd) v Wadley*, (Full Court of the Supreme Court of Tasmania, Wright, Crawford and Zeeman JJ, 27 June 1997), discussed in Chapter 7.

break with the past and cannot sensibly be reconciled with the approach taken in earlier cases in which expectation relief was favoured.

Patrick Parkinson has offered support for the view that the remedial approach taken by the High Court identifies equitable estoppel as part of the law of wrongs.[137] Parkinson suggests that where the effect of an estoppel is to provide a plaintiff with a remedy for reliance on a non-contractual promise, then the intervention of equity to reverse the detriment suffered, rather than to fulfil the expectation, differentiates that doctrine from the law of contract.[138] He observes that, under the approach articulated by Mason CJ in *Verwayen*,[139] which requires proportionality between the remedy and the detriment,

> the role of equity is more analogous to the law of tort than the law of contract. It fulfils expectations only to the extent necessary to reverse a detriment, and its role is to compensate the plaintiff for a wrong rather than to hold the defendant to a promise. In this way the demarcation lines between estoppel and contract are made clear.[140]

The final point to note about the duty created by equitable estoppel is that it remains for the present a purely equitable duty. Peter Birks has argued that, in mapping the law of obligations, there is no legitimate reason to distinguish between wrongs deriving traditionally from the common law and those deriving from equity.[141] There should, Birks suggests, be a single class of wrongs, with a unified remedial regime.[142] For the present, however, the doctrine of equitable estoppel remains distinctly equitable in nature. It is, therefore, properly seen as

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[137] Patrick Parkinson, 'Estoppel' in Patrick Parkinson (ed), *The Principles of Equity* (1996) 201, 226-7.
[138] Ibid 226.
[139] (1990) 170 CLR 394, 413.
[140] Parkinson, above n 137, 227.
[141] Birks, above n 10, 25-52.
[142] Davies, above n 127, 176 on the other hand, has suggested that equitable wrongs may be best left separate from the common law, so that they can develop in their own way. He does argue, however, that the remedies for equitable wrongs 'remain governed to an undesirable degree by their history, being in some instances too restrictive, in others too generous.' Accordingly, he suggests, there is a need for equitable wrongs to be brought into a better relationship with one another, and a need to bridge the gap between the remedies that flow from

part of the equitable branch of civil wrongs, taking its place alongside doctrines such as breach of confidence.[143] Leaving to one side the rhetoric of unconscionability, which certainly gives the doctrine an equitable flavour, the doctrine is clearly equitable in substance. Although the doctrine operates by reference to the tort-like concept of reasonable reliance, it is essentially equitable in nature, being subject to equitable defences and providing a discretion in relation to relief. Equitable defences, such as a lack of clean hands, can be pleaded to prevent an equitable estoppel from arising.[144] Once liability is established, the court's response is classically equitable. Liability in estoppel gives rise to 'an equity', which means that the remedy is at large.[145] Although the courts now seek to protect a representee's reliance interest, the representee does not have a right to relief in damages. Instead, it is within the court's discretion to satisfy the equity as it sees fit, but within certain guidelines. The exercise of that discretion often involves the granting of expectation relief[146] and relief in specie.[147]

As noted above, the preclusionary effect of common law estoppel prevents it from forming a substantive part of the law of obligations. The substantive unified estoppel proposed by Mason CJ would, however, clearly form part of the law of wrongs. It also creates a primary duty, fixed by law, which is based on wrongful harm, the effect of which is compensatory in nature. To the extent that the unified estoppel proposed by Deane J can be regarded as substantive, it is not easily classified within the law of obligations, since its effect is, *prima facie* at least, to fulfil the representee's expectations. Deane J seemed to regard it as falling somewhere between an evidentiary principle and a substantive

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them: ibid 174.

[143] Davies, ibid, discusses breach of confidence, participation in a breach of fiduciary obligation, unconscionable conduct and breach of fiduciary duty as equitable wrongs, but deliberately refrains from exploring the question of how much of equity and trusts should be brought under the heading of wrongs: ibid 175, n 61.

[144] See, eg, *Official Trustee in Bankruptcy v Tooheys Ltd* (1993) 29 NSWLR 641.

[145] See, eg, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 419 (Brennan J).

[146] See Chapter 7 above.

[147] Examples include landmark cases such as *Dillwyn v Llewelyn* (1862) 4 De GF & J 517; 45 ER 1285 and *Crabb v Arun District Council* [1976] 1 Ch 179 as well as more recent cases such as *Drummoyne Distict Rugby Club Inc v NSW Rugby Union* (1994) Aust Contract Reports 90-039 and *S & E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122 ALR 637.

doctrine. Similarly, in the structure of the law of obligations, it would fall somewhere between contract and wrong: while it would be tort-like in its determination of liability (depending on wrongful harm), it would be contract-like in effect (resulting in the fulfilment of promises).

3. The Balance of the Reliance-Based Approach

The normative advantage of a reliance-based approach to estoppel by conduct is that it achieves a balance between various competing factors. There are two clear benefits. The first is that the reliance model achieves a balance between individual liberty and the communitarian value of preventing harm resulting from reliance on the conduct of others. As Hugh Collins explains, on the one hand the reliance model 'attaches less weight to the value of personal autonomy than the classical exchange model.'[148] On the other hand, the requirement that reliance must be reasonable 'allows the courts to preserve a realm of liberty within which parties enjoy room for manoeuvre without incurring legal obligations.'[149]

The second advantage of the reliance-based approach is that it achieves a balance between what Jay Feinman has called 'factual particularisation and normative abstraction'.[150] On the one hand, the reliance-based approach provides a clear basis for determining questions of liability and remedy in estoppel cases. On the other hand, the requirement of reasonableness in the determination of liability, and, in the case of the equitable doctrine, the discretion retained by the court in the granting of relief, ensure that the courts are not solely concerned with abstracted questions. Under a reliance-based approach, liability turns on a balanced combination of the abstracted question of detrimental reliance (whether the representee has acted to his or her detriment on the faith of an assumption induced by the representor's conduct) and the particularised notion of reasonableness of reliance (whether the

[148] Hugh Collins, *The Law of Contract* (1st ed, 1986) 40.
[149] Ibid.
[150] Jay Feinman, 'Promissory Estoppel and Judicial Method' (1984) 97 *Harvard Law Review*

representee's reliance was reasonable in the circumstances).[151] In the granting of relief in the case of the equitable doctrine, a balance is achieved by, on the one hand, the exclusive focus on the consequences of the representee's reliance and, on the other, the discretion that allows the court to do what is necessary to prevent or reverse the detriment resulting from that reliance. Those finely balanced combinations allow questions of liability and remedy to be clearly enunciated and consistently and predictably applied, while retaining the flexibility necessary to do justice in individual cases.

III. CONCLUSIONS

The essential questions posed by this thesis were: what are the goals of estoppel by conduct, and are the principles of estoppel by conduct structured in accordance with those goals? The thesis has shown that the doctrines of estoppel by conduct appear to have three different goals: the fulfilment of promises (including promises relating to the existence of factual states of affairs), the prevention of unconscionable conduct, and the prevention of a particular type of harm resulting from reliance on the conduct of others.[152] The principles of estoppel by conduct are structured in accordance with that plurality of goals: different aspects of the doctrines appear to emphasise different goals. A consequence of the failure to identify a basal purpose or fundamental goal of estoppel by conduct is that, despite the obvious practical importance of both common law and equitable estoppel, numerous doctrinal questions remain unanswered, and it remains difficult to see where estoppel by conduct fits within a coherent structure of the law of obligations.

If one accepts the need to identify a fundamental purpose of estoppel by conduct, then one could approach that question in two ways. First, one could ask the descriptive question of what appears to be the fundamental or principal

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678, 698.

[151] As Getzler, above n 85, 325 has observed in a broader context, a reliance-based principle of obligation provides a 'framework for reasoned resolution of issues' while giving the court 'a sophisticated policy discretion in the ascription of ... responsibility.'

[152] That is, the harm that results where those others act inconsistently with the assumptions

purpose of estoppel by conduct. That essential goal could then be emphasised more strongly in order to provide a coherent basis and a consistent operation for the doctrines of estoppel by conduct. Alternatively, one could ask the normative question of what is the best possible basis for the principles of estoppel or how best could they operate. The outstanding questions in estoppel could then be structured in accordance with that normatively superior philosophy.

This thesis has shown that, descriptively, the principles of estoppel by conduct are organised primarily around concepts of reliance, rather than conscience or promise. Although there is some equivocation between the different philosophies, questions of liability are determined primarily by reference to reliance. The Australian courts appear to prefer a weak threshold on the representor's side to establish an estoppel. The court's attention is then focussed on the question whether the representee has substantially, and reasonably, relied on the assumption induced by the representor's conduct. The courts do not look to the strength of the representor's commitment or to the conscience of the representor to determine liability, despite the prominent rhetoric of unconscionability in the recent equity cases. In relation to remedy, the promise aspect seems most prominent, since the effect of common law estoppel is invariably to fulfil the representee's expectations, and the effect of equitable estoppel is usually to do so. With the articulation of a reliance-based approach to relief in *Verwayen*, relief in the reliance measure should become more common in equity cases. If the unified estoppel proposed by Mason CJ were adopted, reliance would be emphasised consistently in relation to both liability and remedy, and in relation to both assumptions of fact and assumptions of future conduct.

From a normative point of view, this chapter has shown that the reliance-based approach which has come to shape equitable estoppel in recent years best balances the competing factors. The reliance-based approach balances the

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induced by their conduct.

liberal desire for individual freedom of action against the communitarian need to protect reasonable reliance on the conduct of others. It provides clear principles for the determination of questions of liability and relief, while allowing courts the measure of flexibility required to do justice according to the facts of each particular case. The normative superiority of the reliance-based approach to remedy justifies either the extension of the equitable doctrine to cover assumptions of existing fact, or the recognition of a substantive unified doctrine which operates in the manner proposed by Mason CJ in *Verwayen*.

If one accepts that the prevention of harm resulting from reliance on the conduct of others is, and should be, the fundamental purpose of estoppel by conduct, then the unresolved questions identified at the beginning of this chapter can readily be resolved. If both common law and equitable estoppel are fundamentally concerned with the protection of reliance, then there seems little justification for the retention of separate sets of principles relating to assumptions of fact and assumptions of future conduct. The difficult questions of overlap between the common law and equitable doctrines, the unnecessary complexity of this area of the law, and the inadequacies of the common law doctrine with regard to relief can be overcome by the recognition of a single, substantive doctrine of estoppel which operates in relation to assumptions of existing fact, assumptions relating to the rights of the parties and assumptions relating to the future conduct of the representor.[153]

If it is recognised that the unified doctrine is based on the prevention of harm resulting from reliance on the conduct of others, then the unresolved questions relating to the doctrine can be resolved by reference to that fundamental purpose. The emphasis on reliance justifies the trend towards a weak threshold requirement. Instead of focusing on the type of conduct engaged in by the representor, the court should focus on the circumstances of the representee's reliance and the question whether it was reasonable in those circumstances for

[153] As discussed in Chapter 7, however, the practical consequences of a unified doctrine in the 'contract by estoppel' and 'agency by estoppel' cases would need to be resolved before such a doctrine could be accepted.

the representee to adopt, and to act upon, the assumption in question. The question of reasonableness should clearly be considered from the point of view of the representee, and the representor's conscience should have only a limited role to play in the establishment of an estoppel. The knowledge and conduct of the representor should be relevant only to the question whether the representor bears sufficient responsibility for the adoption of the assumption, and should not have any bearing on questions of causation or remedy. If the essential purpose of the common law and equitable doctrines is the same, then unification is clearly desirable. A substantive unified doctrine should seek to provide relief which prevents or reverses detriment resulting from reliance, rather than aiming to fulfil the representee's expectations. Such a unified doctrine would fit neatly within the traditional taxonomy of the law of obligations, as part of the law of wrongs.

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